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No. 1080

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

WILLIAM G. McRAE, PETITIONER

v.

JOHN A. BOYKIN, RESPONDENT

WILLIAM G. McRAE, PRO SE,

Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. ——

WILLIAM G. MCRAE, PETITIONER

v.

JOHN A. BOYKIN, RESPONDENT

Petition for a Writ of Certiorari to the Court of Appeals of the State of Georgia and Brief in support thereof.

Now comes William G. McRae, and prays that a writ of certiorari issue to the Court of Appeals of the State of Georgia, to review here the record and judgment entered by that court on September 19, 1945 (R. 29), which judgment became a final judgment of the court of last resort of the State, denying federal rights of petitioner, when the Supreme Court of the State of Georgia refused to exercise its discretionary power to review said judgment by denying petitioner's application for writ of certiorari on January 16, 1945 (R. 45).

Opinion Below

The opinion of the Court of Appeals of the State of Georgia was entered on September 19, 1945 (R. 29) *McRae v. Boykin*, 35 *S. E. 2d* 548.

Jurisdiction

The jurisdiction of this Court is invoked under Section

237 (b) of the Judicial Code, as amended, (28 U. S. C. A. Section 344 (b)), the highest court of the State of Georgia having denied to petitioner a title right, privilege and immunity specially set up and claimed by him under the Constitution of the United States.

Federal Questions Raised by Plea to Scire Facias to Revive Dormant Judgment

Scire facias to revive a dormant judgment (R. 5) was issued upon petition (R. 3) brought by John A. Boykin against William G. McRae in Fulton County Superior Court. McRae filed his plea under oath (R. 6) specially setting up and claiming a denial by the State of Georgia through the agency of the Court of Appeals, upon appeal from said original judgment, of his rights to equal protection of the laws and due process of law under the provisions of the Fourteenth Amendment of the Federal Constitution. Boykin filed his general demurrer to the plea. (R. 27) The demurrer was sustained and the plea stricken (R. 28) and judgment was entered reviving the original judgment. (R. 28) On Bill of Exceptions to the Court of Appeals (R. 1) assigning error upon these rulings of the trial court, the Court of Appeals affirmed the judgment of the trial court. (R. 35) In denying the federal rights asserted by McRae in his plea the Court of Appeals said (R. 34):

> "It was held by the U. S. Supreme Court, in *Dunbar v. City of New York*, 251 U. S. p. 516, that 'Constitutional rights cannot be based on error in prior court decisions'."

Motion for Rehearing was filed (R. 35) and was denied by the Court of Appeals (R. 44). Application for writ of certiorari was made to the Supreme Court of Georgia, and the writ was denied January 16, 1946 (R. 45). All possibilities afforded by state procedure for a review of the judgment of the Court of Appeals by all state tribunals have been exhausted.

Questions Presented

1. Whether or not a party who is injured by the affirmance of a judgment against him on appeal, because of the application to his case on the appeal of an arbitrary and discriminatory rule, unsupported by law, which is different from and in conflict with the established rules of law applicable and applied in such cases to all other persons litigant in said Appellate Court, under the same or similar circumstances, may, in response to a scire facias brought to revive the judgment so affirmed, defend upon the ground that the State, by the decision of its Appellate Court on the former appeal, through the application of an arbitrary and discriminatory rule, deprived him of equal protection of the laws in violation of the provisions of the 14th Amendment of the Federal Constitution.

2. Whether or not a party against whom a writ of scire facias issues, requiring him to show cause why a judgment against him which had become dormant should not be revived, may, in response to the rule, set up and claim as a defense to such revival: that the judgment sought to be revived was appealed to an appellate court of the State upon error being assigned thereon, because of antecedent erroneous rulings of the court, and that in passing upon said appeal the appellate court, in affirming said judgment, has denied said party equal protection of the laws and deprived him of his property without due process of law in violation of his rights under the Fourteenth Amendment of the Federal Constitution.

3. Whether or not a denial of due process of law and a denial of equal protection of the laws by the appellate court in passing upon the assignments of error in a bill of exceptions challenging the legality of a judgment may be pleaded as a defense in a proceeding to revive said judgment.

Specification of Errors to be Urged

The Court of Appeals of Georgia erred—

1. In holding that its former judgments in the case of *McRae v. Boykin*, 50 *Ga. App.* 866, 54 *Ga. App.* 158, and the judgment of the Supreme Court of Georgia in *Boykin v. McRae*, 182 *Ga.* 252, is res adjudicata and conclusive between the parties as to whether the Court of Appeals by its former decisions and judgments denied to petitioner equal protection of the laws and deprived petitioner of his property without due process of law, in violation of the Fourteenth Amendment of the Federal Constitution.

2. In holding that a denial of due process of law and a denial of equal protection of the laws by the Court of Appeals in passing upon the assignments of error in a bill of exceptions challenging the legality of a judgment may not be pleaded as defenses in a proceeding to revive said judgment.

3. In denying to petitioner the right to plead defenses to a writ of scire facias to revive a dormant judgment which were not available to him on the original trial, and which petitioner was not precluded by judgment, or otherwise forbidden by law to set up, and which defenses are based upon a claim of substantial right, to-wit: a claim of denial of equal protection of the laws to petitioner by the State, and a claim that the State deprived petitioner of his property without due process of law in the former decisions by its Court of Appeals on appeal from said judgment, wherein it applied an arbitrary and discriminatory rule against petitioner, contrary to the established rules of law applicable and applied to all other persons litigant in said Court under the same or similar circumstances, in violation of the provisions of the Fourteenth Amendment of the Federal Constitution, and which defenses did not arise until after its judgments on the former appeal.

4. In denying to petitioner his right to claim by plea the benefit of the constitutional doctrine of stare decisis established by Article VI, Section II, Paragraph IX, of the Constitution of the State of Georgia, which provides:

> "The decisions of the Supreme Court shall bind the Court of Appeals as precedents,"

by upholding the application by it, on petitioner's former appeal, of an arbitrary and discriminatory rule, unsupported by law, and which was different from the established rules of law laid down by the Supreme Court of Georgia in the decisions specified in said plea, and which established rules of law have been applied by said Court of Appeals and the Supreme Court of Georgia to other persons litigant in said courts, under the same or similar circumstances, and in thus denying to petitioner in this case his legal and constitutional right to plead as a defense to the scire facias the fact that the State of Georgia, through the agency of said Court of Appeals, had, upon the former appeal in said case, denied to petitioner the equal protection of the laws and deprived petitioner of his property without due process of law, contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.

5. In denying the asserted federal rights of petitioner through its application of its own former judgment on appeal, such application being clearly inconsistent with due process of law.

6. In holding that no issuable facts were raised in petitioner's plea in the present proceeding.

7. In affirming the judgment of the trial court.

Summary Statement of the Matter Involved

In 1933, William G. McRae brought suit against John A. Boykin in the City Court of Atlanta, Fulton County, Georgia, claiming damages for libel. McRae alleged that Boykin de-

famed him during a political race in which McRae was a candidate opposing Boykin's re-election to the office of Solicitor-General of the Atlanta Judicial Circuit, in the State of Georgia. Boykin had charged in the press and over the radio that McRae was a bribe-taker, which charge McRae alleged was falsely and maliciously made by Boykin with intent to injure and damage him. Boykin filed his answer to the petition, admitting that he had charged McRae with being a bribe-taker, but pleaded privilege. Boykin also filed a cross-bill in which he alleged that McRae had libeled him during the campaign by falsely and maliciously publishing of and concerning him that "Boykin's reputation as a frame-up artist was well known to the people of Fulton County," and that "Boykin had framed Jack Lance for the murder of Bert Donaldson." McRae filed a plea of privilege to the cross-bill. When the case was called for trial, Boykin withdrew his plea of privilege in the main case and filed a plea of justification.

Upon the trial of the case, Boykin was permitted, over McRae's objection, to read to the jury the depositions of certain witnesses which were offered in support of his belated plea of justification. McRae had made timely motion to suppress these depositions, which motion was overruled by the court. McRae offered to testify in support of his plea of privilege to the cross-bill and offered certain documentary evidence, in support of said plea, but upon objection by Boykin that said proffered testimony and said documents were irrelevant and immaterial to the issues in the case, they were excluded from the jury by the trial court.

The jury found a verdict for $1,000.00 in favor of Boykin upon his cross-bill and judgment was entered against McRae based upon said verdict.

McRae carried the case to the Court of Appeals of the State of Georgia, by direct bill of exceptions, assigning error upon

the rulings of the trial judge in failing to suppress the depositions and in permitting said depositions to be read to the jury in support of Boykin's plea of justification, and upon the rulings of the trial judge in excluding from the jury the proffered testimony and documentary evidence offered by McRae in support of his plea of privilege filed to Boykin's cross-bill, upon which the verdict in the case was based, and also assigning error upon the final judgment, because of the antecedent errors in the admission and exclusion of said evidence, which entered into and affected said final judgment. Error was also assigned upon the failure of the trial judge to write out and read to the jury a written charge upon timely request by McRae.

Boykin filed his motion in the Court of Appeals of Georgia, to dismiss the bill of exceptions upon the ground that error in failing to write out and read to the jury a written charge, and errors committed in rulings as to the admission or exclusion of evidence upon the trial, were not such errors as may be reviewed by the Court of Appeals of Georgia upon direct bill of exceptions, but could only be reviewed upon a bill of exceptions assigning error upon the denial of a motion for new trial. The Court of Appeals held such errors to be reviewable by it upon direct bill of exceptions, and proceeded to pass upon the questions presented to it. *McRae v. Boykin*, 50 *Ga. App.* 866.

In its said decision, the court held that all of the above specified rulings of the trial judge were erroneous as contended by McRae. It held that the failure of the trial judge to write out and read to the jury a written charge was reversible error, and reversed the judgment of the lower court upon this ground. It also held that the trial judge erred in failing to suppress the depositions and in permitting the evidence contained therein to be read to the jury in support of Boykins plea of justification in the main action, and that the trial judge erred in excluding from the jury the testimony and documents proffered by McRae

in support of his plea of privilege to Boykin's cross-bill. However, by its application of an arbitrary and discriminatory rule, unsupported by law, it held that the errors of the trial judge in permitting the jury to consider illegal evidence in support of Boykin's plea of justification, and in declining to let the jury consider legal evidence in support of McRae's plea of privilege to the cross-bill, were harmless errors, not requiring the grant of a new trial.

As will be hereinafter shown, it is the application of said arbitrary and discriminatory rule by the Court of Appeals, on the former appeal of the case, which is the basis of petitioner's claims, set up in his plea to the scire facias, that the State thereby deprived him of his property without due process of law and denied to him equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Federal Constitution.

Both Boykin and McRae filed applications in the Supreme Court of Georgia for review on writ of certiorari of the rulings of the Court of Appeals in said decision that were adverse to them. McRae's application for writ of certiorari was denied. Boykin's application was granted. The Supreme Court of Georgia affirmed the judgment of the Court of Appeals in overruling and denying Boykin's motion to dismiss the direct bill of exceptions, but reversed the judgment of the Court of Appeals granting a new trial for failure of the trial judge to write out and read to the jury a written charge upon the ground that McRae had waived the right to except to such failure. *Boykin v. McRae*, 182 *Ga.* 252.

McRae then filed in the Court of Appeals a motion requesting the court to revise its opinion that the errors found by it with respect to the admission and exclusion of said evidence were harmless errors. The Court of Appeals entertained and con-

sidered the motion, but held that the rulings theretofore made should not be changed or modified, except in accordance with the decision of the Supreme Court on certiorari, and the motion to revise the opinion was denied and the judgment of the trial court was affirmed. McRae's application to the Supreme Court of Georgia for writ of certiorari to review this judgment was denied. *McRae v. Boykin* 54 *Ga. App.* 158.

The original judgment became dormant after the lapse of more than seven years during which time Boykin made no attempt to enforce it.

On October 14, 1944, upon petition of Boykin, a writ of scire facias was issued and served upon McRae requiring him to show cause why said judgment should not be revived. (R. 5)

McRae filed an issuable plea under oath setting up that the State of Georgia, through its Court of Appeals, in passing upon the assignments of error made by him in his bill of exceptions in McRae v. Boykin, supra, applied an arbitrary and discriminatory rule, unsupported by law, and thereby deprived him of his property without due process of law and denied him equal protection of the laws in violation of the provisions of Article XIV, Section 1 of the Constitution of the United States. (R. 6)

Boykin filed a general demurrer to said plea (R. 27). The trial court sustained Boykin's general demurrer, struck McRae's plea (R. 28) and entered an order reviving said judgment. (R. 28)

McRae carried said case to the Court of Appeals of Georgia by bill of exceptions assigning error upon said rulings of the trial court. (R. 1) The Court of Appeals affirmed the judgment of the trial court upon the ground that its former decisions in McRae v. Boykin, supra, and the decision of the Supreme Court

of Georgia in *Boykin v. McRae,* 182 *Ga.* 252, were res adjudicata of the constitutional questions raised, and upon the ground that constitutional rights can not be based on error in prior court decisions. Opinion of September 19, 1945. (R. 29)

McRae filed his motion for rehearing which was denied (R. 44).

McRae filed his application for writ of certiorari in the Supreme Court of Georgia which was denied (R. 45).

Petitioner incorporates in the appendix hereto copies of the former opinions in the case: *McRae v. Boykin,* 50 *Ga. App.* 866; *Boykin v. McRae,* 182 *Ga.* 252; *McRae v. Boykin,* 54 *Ga. App.* 158.

Reasons for Granting the Writ

The decision of the Court of Appeals of Georgia in this case has decided Federal questions of substance which have not heretofore been determined by this court, and has decided them in a way probably not in accord with applicable decisions of this Court. The decision of the Court of Appeals of Georgia should be reviewed by this Court because:

1. The decision of the Court of Appeals of Georgia disposing of the Federal questions raised by petitioner in his plea, by following its decision on a former appeal as the law of the case, deprives petitioner of his right to defend the action upon the ground that the State, through the decision of its said court on the former appeal, denied to petitioner equal protection of the laws and due process of law in violation of the Fourteenth Amendment of the Federal Constitution, and such decision cannot be regarded as resting on the independent non-federal ground of res adjudicata, under the rulings of this Court in *Southern Railway Co. v. Clift,* 260 *U. S.* 316.

2. The decision of the Court of Appeals of Georgia holding that the language in the decision of this Court in *Dunbar v. City of New York*, 251 *U. S.* 516, that "Constitutional rights cannot be based on error in prior court decisions," precludes petitioner from claiming that the State of Georgia, through the said Court of Appeals of Georgia, has denied petitioner equal protection of the laws and due process of law by its decision on a former appeal of this case, and is tantamount to depriving the citizens of the United States residing in Georgia of the right to demand equal protection of the laws and due process of law at the hands of the judicial branch of the State government, and is in conflict with the decision of this Court in *Virginia v. Rivers*, 100 *U. S.* 313, 322, where this court held that "Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court."

3. This Court should review and reverse the decision and judgment of the Court of Appeals of Georgia in this case, because it affirmed a ruling of the trial court denying petitioner the right to plead in answer to a writ of scire facias to revive a judgment—a denial by said Court of Appeals to petitioner of equal protection of the laws and due process of law on a former appeal from said judgment, as a result of which said denials, said judgment was illegally affirmed. This case proceeded to judgment upon the pleadings. It is elementary, therefore, that every uncontradicted allegation of fact made in petitioner's plea must be taken as true.

4. This is the first occasion that there has been presented to this Court the question whether a denial of equal protection of the laws by an appellate judicial tribunal of a State while affirming a judgment on appeal, may be pleaded by the injured party as a defense to a writ of scire facias brought to revive the judgment so affirmed.

I

THE COURT OF APPEALS OF GEORGIA IS WITHOUT JURISDICTION TO RENDER A JUDGMENT WHEREIN IT DECIDES A QUESTION OF LAW CONTRARY TO A PREVAILING DECISION OF THE SUPREME COURT OF GEORGIA.

This court said in *State of Missouri, ex rel. Gaines v. Canada, et al*, 305 *U. S.* 337 (7):

> "The 'equal protection of laws' is a pledge of the protection of equal laws."

In *Hill v. State of Texas*, 316 *U. S.* 400, this court declared:

> "Equal protection of the laws is something more than an abstract right. It is a command which the State must respect, the benefits of which every person may demand."

The people of Georgia, in their Constitution, Article VI, Section II, Paragraph IX, have ordained:

> "The decisions of the Supreme Court shall bind the Court of Appeals as precedents."

This constitutional doctrine of stare decisis, insofar as the jurisdiction of the Court of Appeals is concerned, is a command to the Court of Appeals that when a point of law has been settled by decision of the Supreme Court of Georgia, it forms a precedent which is not afterwards to be departed from by the Court of Appeals of Georgia, unless it is changed by the Supreme Court in the manner provided by law.

The rule of stare decisis is stated in Broom Leg. Mx. 7th edition 147, as follows:

> "To abide by former precedents, *stare decisis*, where the same points come again in litigation, as well to keep

> the scale of justice even and steady, and not liable to waiver with every new judge's opinion, as also because, the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or swerve from according to his private sentiments; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land,—not delegated to pronounce a new law, but to maintain and expound the old one—jus dicere et non jus dare."

It is the law of Georgia that—

> "Errors are presumed to be harmful to the losing party, unless the contrary plainly appears."

The foregoing statement was made by the Supreme Court of Georgia in a decision by a full bench in the case of *Battle v. Royster Guano Co.* 155 *Ga.* 322 (3). The principle there followed was laid down in different language by the same court in the early case of *Tedder v. Stiles*, 16 *Ga.* 1, 2 (6), as follows:

> "Whenever the rights of a party are withheld or violated, the presumption of law is, that he has been harmed."

The same rule, as applied to the exclusion of evidence, was announced by the decision of this Court in *Crawford v. United States*, 212 *U. S.* 183, in the following language:

> "If the erroneous exclusion of evidence injuriously affects a substantial right it is reversible error. It is only in cases where the *absence of harm* is *clearly shown by the record* that the commission of such error against the party complaining is not cause for new trial."

The Court of Appeals of Georgia always applied the foregoing rule of law in similar cases prior to its decisions in the

cases of *McRae v. Boykin*, 50 *Ga. App.* 866, 54 *Ga. App.* 158, and has consistently applied the same rule since that time in similar cases. Only in McRae v. Boykin, supra, did the Court of Appeals adopt an arbitrary and discriminatory rule different from the foregoing rule of law.

In McRae v. Boykin, supra, the Court of Appeals arbitrarily ruled that although the record showed numerous material errors which deprived petitioner of substantial rights, and nothing in the record showed absence of harm in any of said errors, they should be considered harmless errors upon speculation by the Court as to matters which possibly might have appeared in the record if the trial judge had not certified otherwise. The Court of Appeals in thus speculating as to the possibility that there might have been "other evidence," and its further speculation as to whether said "speculative" other evidence was "but slight evidence, or doubtful evidence, or evidence that was not clear and convincing," or whether such "speculative" other evidence was "clear and convincing," is a direct impeachment of the certificate of the trial judge to the bill of exceptions: "That the foregoing bill of exceptions is true, and contains *all* of the evidence and specifies *all* of the record material to a clear understanding of the errors complained of." (Italics mine)

In the erroneous exclusion of evidence, "it is only in cases where the *absence of harm* is *clearly shown by the record* that the commission of such error against the complaining party is not cause for new trial." *Crawford v. United States*, 212. *U. S.* 183.

In *Rice v. Ware*, 3 *Ga. App.* 573, 578, the Court of Appeals in one of its earliest decisions, said that the reviewing court must conclusively presume that evidence omitted by the trial judge was not such that it could in any wise affect the decision of the question presented in the record. On page 578 of the opinion the court said:

"By the act of 1889 (Civil Code, 5528), the provisions of which are mandatory and not merely directory, 'If the case is not one in which a motion for new trial is to be reviewed, the plaintiff in error shall plainly and specifically set forth the errors alleged to have been committed, shall incorporate in the bill of exceptions a brief of so much of the written and oral evidence as is material to a clear understanding of the errors complained of, and shall specify therein such portions of the record as are material to such understanding. If none of the evidence is material to elucidate the errors complained of, this fact shall be stated and the evidence omitted. The judge to whom such bill of exceptions is tendered shall, if needful, change the same so as to conform to the truth and make it contain all the evidence, and refer to all of the record, necessary to a clear understanding of the errors complained of;' and the certificate to the bill of exceptions recites that it contains all of the evidence material to a clear understanding of the errors complained of. *In such case the trial judge, and not the reviewing court,* is given the *power to decide* whether any portion of the evidence is *immaterial,* and therefore to be *omitted.* We therefore *conclusively presume* that the *omitted* evidence was *not* such that it could in *any wise affect* the *decision* of the *question presented* in the record." (Italics mine)

The affirmance of the judgment against petitioner by the Court of Appeals on the former appeal in this case was a clear denial of equal protection of the law and due process of law to petitioner.

In divisions 2 and 3 of its decision on the former appeal, *McRae v. Boykin,* 50 *Ga. App.* 866, the Court of Appeals adjudicated the admission of certain depositions in evidence in support of Boykin's plea of justification to be error, then proceeded to hold the admission of said depositions in evidence to be harmless error, citing as authority the cases of *Matthews v. Richards,* 19 *Ga. App.* 489 (2) (91 *S. E.* 914); *Smith v. State,* 23 *Ga. App.*

76 (97 *S. E.* 454); *L. & N. R. Co. v. Lovelace*, 26 *Ga. App.* 286 (106 *S. E.* 6); *and General Tire and Rubber Co. v. Brown Tire Co.*, 46 *Ga. App.* 548 (168 *S. E.* 75).

The cited decisions are not authority for the proposition that the Court of Appeals may impeach the certificate of the trial judge that "the bill of exceptions contains all of the evidence material to a clear understanding of the errors complained of" by speculating that "other evidence" material to a clear understanding of the errors complained of might have been omitted from the bill of exceptions by the trial judge.

On the contrary, each of said cited cases support the contention of petitioner that error will be considered harmless *only where the absence of harm is clearly shown by the record.* In each of the cases cited it appeared affirmatively from the evidence contained in the bill of exceptions or from the certificate of the trial judge thereto that a great amount of other evidence to the same effect as the evidence which was ~~excluded~~ admitted over objection was admitted upon the trial without objection. Nothing of that kind appeared in this case, and said citations were not in the least applicable to the facts in this case on said former appeal.

In division 5 of its decision on the former appeal, not a single authority is cited by the Court of Appeals in support of its conclusion, that the error committed by the trial judge in excluding all of the oral testimony and documentary evidence offered by petitioner in support of his valid plea of privilege, was harmless, upon the theory that there might have been "other evidence" offered in support of said plea. There exists no authority for such an arbitrary and discriminatory ruling, and it is contrary to the established principles of law in Georgia as set out in petitioner's plea to the writ of scire facias.

In its opinion in the *instant* case the Court of Appeals, in listing cases of the Supreme Court of Georgia with which petitioner

charged its arbitrary ruling in McRae v. Boykin, supra, to be in conflict, named all of the five cases enumerated in petitioner's plea, except the case of *Battle v. Royster Guano Co.*, supra.

The significant omission of any reference to *Battle v. Royster Guano Co.*, supra, is no doubt due to the embarrassment it suffers as a result of petitioner having called to the court's attention that it had cited *Battle v. Royster Guano Co.*, supra, in support of its ruling in a similar case which it decided long after its decisions in *McRae v. Boykin*, supra. In the case of *Stanley v. Warner Brothers Pictures*, 64 *Ga. App.* 228, 231, 232, it applied the rule in *Battle v. Royster Guano Co.*, supra.

Dealing with the contention that an error in striking an amendment was harmless, Broyles, C. J., on motion for rehearing in the Stanley case, said:

> "In their motion for a rehearing of this case the movants contend that the error, if error, in striking the amendment to the petition was harmless, since on the trial the plaintiff was permitted to offer and to have admitted all the evidence that could have been admitted if the amendment had been allowed. The record does not affirmatively support this contention. It does appear therefrom that some evidence in support of some of the allegations of the stricken amendment was admitted, but it fails to appear that such evidence was not admitted for limited purposes only. And it does not appear that *all* of the evidence that would have been admissible, if the amendment had been allowed, was admitted on the trial. The cases cited by movant, which hold that where *all* evidence, which could have been admitted in support of a stricken amendment, was thereafter admitted, the error in striking the amendment was harmless, are differentiated from this case. Since an error by the court 'is presumed to be harmful to the losing party, unless the contrary plainly appears,' the error 'must be held to have been prejudicial,' and a new trial should be granted. *Battle v. Royster Guano Co.*, 155

> *Ga.* 322 (3) (118 *S. E.* 343). In the instant case this court cannot hold that it 'plainly appears' that the plaintiff was permitted to introduce *all* the evidence that he could have introduced had the amendment in question been allowed."

Having held that it is reversible error to strike a material amendment unless it clearly appears affirmatively from the record that *all* of the evidence that would have been admissible, if the amendment had been allowed, was admitted on the trial; we asked the Court of Appeals why the exclusion of *all* of petitioner's material evidence, and even the proffered oral testimony of petitioner as to his possession of said evidence, both of which were offered by petitioner in support of his pending valid plea to the cross-action in the case, could be considered harmless error by said court, in the absence of anything in the record to show that even a scintilla of evidence was admitted in support of said plea?

Unwilling to make a straight-forward answer to that question, the Court of Appeals attempts to avoid its discriminatory decision, denying equal protection of the laws to petitioner, by resort to a misapplication of the doctrines of "res adjudica" and "law of the case."

II

Decisions On Former Appeal Of Case Not Res Adjudicata Of Question Whether By Said Decisions Themselves Petitioner Was Denied Due Process Of Law And Equal Protection Of The Laws

In the second division of its opinion the Court of Appeals holds that its opinion and judgment on the former appeal of this case is forever binding upon the parties and their privies,

even though by its said opinion and judgment it did deprive petitioner of his property without due process of law and denied petitioner equal protection of the laws.

Judgments are conclusive between parties and their privies only as to "matters put in issue, or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered." *Code of Georgia*, 1933, *Section* 110-501.

The matter of whether the Court of Appeals did, by its former opinion and judgment, deny petitioner equal protection of the laws, could not be known until after said judgment was rendered, and could not have been put in issue before said judgment was rendered.

This Court, in *Virginia v. Rivers*, 100 *U. S.* 313, 318-319, defines the time when the issue as to a denial of equal protection of the laws by judicial tribunals arises, as follows:

> "The violation of the constitutional provisions, when made by the judicial tribunals of a State, may be, and generally will be after the trial has commenced. It is then, during or after the trial, that denials of a defendants rights by judicial tribunals occur. Not often until then. Nor can the defendant know until then that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied or that he cannot enforce it, in the judicial tribunals."

The doctrine of res adjudicata, sought to be invoked in the second division of the Court of Appeals decision in this case, clearly does not reach the issue as to whether by its former judgment it denied petitioner the equal protection of the laws. This issue did not arise until after the former judgment affirmed that equal protection was denied. Until that judgment petitioner could not affirm that equal protection of the laws was denied, and could not affirm that he could not enforce his right to equal protection of the laws in that court.

The Court of Appeals decision in this case does not rest, therefore, upon the independent non-federal ground of res adjudicata.

In *Southern R. Co. v. Clift*, 260 *U. S.* 316, 317, this court said:

> "A decision of a state court disposing of a federal question by following its decision on a former appeal as the law of the case, cannot be regarded as resting on the independent, non-federal ground of *res adjudicata*."

See also, *Postal Telegraph Cable Co. v. Newport*, 247 *U. S.* 464.

In discussing the protection afforded citizens by the Fourteenth Amendment of the Constitution at page 318 of the opinion in *Virginia v. Rivers*, supra, this court said:

> "It is doubtless true that a state may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of the agencies or another."

And on page 322 of the opinion in the same case, this court said:

> "Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this court."

In *First National Bank v. Anderson*, 269 *U. S.* 347, 346, this Court said:

> "Whether a pleading sets up a sufficient right of action of defense, grounded on the Constitution, or a law of the United States, is necessarily a question of Federal law; and where a case coming from a State court presents that question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense,

> and is not concluded by the view taken of them by the State Court."

The multitudinous errors found by the Court of Appeals to have been committed on the original trial are, by law, presumed to be harmful to petitioner. This presumption is rebutted only where absence of harm is clearly and plainly shown by the record before the Court of Appeals. Absence of harm did not so appear from that record, and the Court of Appeals so stated, in its decision on the former appeal. In depriving petitioner of the presumption of harm which the law attaches to errors committed against him, while sustaining this presumption in favor of other persons litigant in said court under the same or similar circumstances, the Court of Appeals denied petitioner the equal protection of the laws.

Petitioner has sought to have the courts of Georgia to rectify the gross injustice done him, but without success. He now asks this court to invoke its revisory powers and to reverse the decision of the Court of Appeals which has denied petitioner's claim to equal protection of the laws, as set up in his plea in the lower court.

As was said by this Court in *Louisville Gas Co. v. Coleman*, 277 *U. S.* 32:

> "The equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances. It applies to the exercise of all the powers of the State which can affect the individual or his property."

The Petition for Certiorari should be granted in order that this Court may review the decision of the Court of Appeals of Georgia in this case.

Respectfully submitted,
WILLIAM G. MCRAE, PRO SE,
Petitioner.

APPENDIX

23926 McRae v. Boykin, 50 Ga. Appeals, 866

1. An error of law may be reviewed and corrected by this court upon direct bill of exceptions which assigns error upon the final judgment, where the commission of the alleged error by the trial court deprived the plaintiff in error of a substantial right; and where it is shown that the error complained of was harmful and prejudicial and necessarily affected the verdict.

2. Where the questions propounded to a witness under deposition, taken under sections 5904 et seq. of the Civil Code (1910), by the plaintiff on cross-examination, have not been answered by the witness, and the notice of exceptions as provided in section 5904 of the code has been given to the defendant, and there is no motion by him to continue the trial of the case, and it proceeds to trial, the refusal of the court to sustain the exceptions of the plaintiff to the motion to suppress the depositions of the witness is erroneous, and may in a proper case require the grant of a new trial.

3. In order for this court to grant a new trial because of alleged error in the introduction of evidence, upon direct exception to this court, it is incumbent upon the plaintiff in error to affirmatively show in the bill of exceptions that he was harmed and prejudiced by such ruling, and where there is no brief of the evidence before this court, and it is not made to appear from the bill of exceptions but that there was other evidence before the jury upon the same subject, the plaintiff in error fails to show error requiring the grant of a new trial in the erroneous introduction of such evidence.

4. Where the defendant assumed, without objection, the burden of proof, it was not error to allow him to open and conclude the argument before the jury. With this principle in view, in order to successfully assign error, in a direct bill of exceptions, upon the action of the trial court in refusing to allow

the plaintiff in error, plaintiff in the court below, the right to open and conclude the argument before the jury, it was necessary for him to affirmatively show that he had the right to open and conclude, and that he had not waived it by acquiescing in the assumption by the defendant of the affirmative of the proof.

5. While the trial court erred in refusing to admit the plaintiff's proffered testimony set out in the bill of exceptions, and certain newspaper articles and court records in support of such testimony, which were in support of the plea of privilege filed by the plaintiff in response to the defendant's cross-action, the assignments of error thereon in the direct bill of exceptions, not affirmatively showing that such action of the trial judge was harmful and prejudicial and necessarily affected the verdict, are insufficient to show reversible error.

6. Before the failure of the court to give in charge a requested principle of law will authorize the grant of a new trial, it must appear that the requested instruction was applicable to the facts and pertinent to the issues and was not covered by the general instructions given by the court to the jury; and where neither the general charge of the court nor any brief of the evidence adduced upon the trial is before this court, and it does not affirmatively appear from the direct bill of exceptions sued out by the losing party below that the principle embodied in the requested instruction was not substantially covered in the general instructions, it is not shown that the refusal and failure of the trial court to so charge the jury was erroneous.

7. The trial judge erred in failing to write out his charge in this case and read it to the jury, a written request that he do so being made by counsel for the plaintiff in error during the trial (which consumed several days) and at least two days before the judge began his charge to the jury. Such failure rendered the charge as given to the jury a nullity.

Decided February 18, 1935. Rehearing Denied March 1, 1935. Action of libel; from city court of Atlanta—Judge Dorsey. December 21, 1933. (Application to Supreme Court for certiorari.)

George G. Finch, for plaintiff.

William G. Grant, Marion Smith, James A. Branch, James W. Austin, E. A. Stephens, J. Walter LeCraw, William Schley Howard, R. Emerson Gardner, for defendant.

SUTTON, J. William G. McRae brought suit against John A. Boykin for alleged libel. The defendant answered and filed a counter-claim, based on alleged libelous statements of the plaintiff concerning him, which he alleged had damaged him. The case proceeded to trial before a jury and the trial resulted in a verdict for the defendant for $1,000. Plaintiff made no motion for new trial, but sued out a writ of error direct to this court, assigning error upon certain rulings, orders, and charges of the court, as being necessarily controlling upon the final verdict and judgment in the case. No brief of the evidence adduced upon the trial of the case was incorporated in the bill of exceptions, or attached thereto and properly identified, or sent up with the record and duly approved.

1. The defendant moves to dismiss the writ of error, on the ground that the assignments of error are as to matters which do not necessarily control the verdict and judgment; and that the recitals in the bill of exceptions that the rulings complained of were controlling and affected the verdict were conclusions of the plaintiff in error, and that the bill of exceptions should point out how and in what manner such rulings entered into, affected, and necessarily controlled the final verdict and judgment. Exceptions were taken to and error assigned on the rulings complained of. Exceptions were also taken to and error assigned on allowing the verdict to be taken and judgment

entered, because the alleged erroneous rulings entered into and affected the final judgment. Under the ruling in *Lyndon v. Georgia Railway & Electric Co.*, 129 *Ga.* 353, 360 (58 *S. E.* 1047), this was sufficient. "In any cases where the judgment, decree, or verdict has necessarily been controlled by one or more rulings, orders, decisions, or charges of the court, and the losing party desires to except to such judgment, decree, or verdict, and to assign error on the ruling, order, decision or charge of the court, it shall not be necessary to make a motion for new trial, nor file a brief of the evidence, but the party complaining shall be permitted to present a bill of exceptions containing only so much of the evidence or statement of facts as may be necessary to enable the Supreme Court to clearly understand the ruling, order, decision, or charge complained of." (Civil Code (1910), P. 6144. The method of bringing cases to this court by direct bill of exceptions, as pointed out in this section of the code, without filing a brief of the evidence, "does not authorize the segregation and bringing to this court, by direct bill of exceptions, of every alleged error committed in the course of a trial. It only authorizes this to be done by direct and brief form of bill of exceptions in cases where the judgment, decree, or verdict has necessarily been controlled by such rulings, orders, decisions, or charges; and this must be made to appear." *Henderson v. State*, 123 *Ga.* 739 (2) (51 *S. E.* 764). The act of 1898 (Ga. L. 1898, p. 92) "renders unnecessary the filing of a motion for a new trial, when the case depends upon a controlling question of law and the complaint is that the trial judge committed a vital error with respect to the same. The losing party in any case might very properly concede that, under the evidence and a given charge, the verdict against him, assuming the charge to be correct, was demanded; yet, at the same time, he might with abundant reasons insist that because of error in the charge, the jury were constrained

to find as they did. The correction by this court of such an error results in a new trial." *Taylor v. Reese*, 108 *Ga.* 379, 381 (33 *S. E.* 917); *Taylor v. State*, 108 *Ga.* 384 (34 *S. E.* 2). This act was but an adoption in more explicit terms of the common law already in force in this State. *Taylor v. Reese*, supra. Prior to that act the Supreme Court had held that it would not grant a new trial in cases where no motion therefor had been made in the lower court except that the errors complained of "were serious and likely to change the verdict." *Roberts v. Neal*, 62 *Ga.* 163. In *Trippe v. Wynne*, 76 *Ga.* 200, it was intimated that the court would, in such an instance, only pass upon the error where the same was "material." In *Collier Co. v. Murphey*, 108 *Ga.* 777 (33 *S. E.* 641), decided after the above act of 1898 was adopted, it was held that an erroneous ruling of the trial court as to who was entitled to the opening and closing argument before the jury would not be reversed on a direct bill of exceptions, unless the same was shown to be injurious to the excepting party. In *Ocean Steamship Co. v. Hamilton*, 112 *Ga.* 901 (3) (38 *S. E.* 204), it was held that the error complained of in a direct bill of exceptions should be one which "singly or in connection with another or others" necessarily controlled the verdict, and that if it was not, the direct exception was without avail. See also *Ray v. Morgan*, 112 *Ga.* 923 (38 *S. E.* 335); *Darien Bank v. Clarke Lumber Co.*, 112 *Ga.* 947, 951 (38 *S. E.* 363); *Cable Co. v. Parantha*, 118 *Ga.* 913 (45 *S. E.* 787).

Counsel for the defendant contends that this court has no jurisdiction to pass upon any question made in the bill of exceptions, for the reason that the verdict was not necessarily controlled by any of the rulings, decisions, or charges complained of, within the meaning of said act of December 20, 1898, embodied in the Code of 1910, P. 6144. In order to determine the true interpretation to be placed upon this act it

is necessary to consider the practice as it existed prior to its passage. An able and elaborate discussion of this question will be found in *Cawthon v. State*, 119 *Ga.* 395, 402 (46 *S. E.* 897), et seq, in which it was in substance and effect held: Cases may be carried to the Supreme Court "on a bill of exceptions specifying the error or errors complained of in any decision or judgment." See 1 *Ga. viii, ix.* In the first criminal case brought to the Supreme Court no motion for a new trial was made, but the case was brought to that court upon a bill of exceptions assigning error upon a ruling refusing to continue the case, upon rulings made while the jury was being impanelled, and upon rulings made on the admission and rejection of evidence. The court entertained jurisdiction of the writ of error, and reversed the judgment. *Sealy v. State*, 1 *Ga.* 213 (44 *Am. D.* 641). In the next criminal case brought to the Supreme Court, the bill of exceptions assigned error upon various rulings made during the trial, upon the overruling of a motion to arrest the judgment, and upon the overruling of a motion for a new trial. The court entertained jurisdiction of this writ of error, and granted a new trial to the defendant. Both of these cases were brought to the Supreme Court under the law as set out above as contained in the 1 *Ga. viii, ix.* "While no question was made in either case or directly passed upon by the court as to what was the proper practice to be pursued, or what was the proper construction of the act organizing the court, the practice followed by lawyers of the standing of those who represented the plaintiffs in error," Hines Hold and Henry L. Benning, "and acquiesced in by such lawyers as Levi B. Smith, E. H. Worrill, and Absalom H. Chappell, who represented the State in the respective cases, is entitled to very grave consideration when it is to be determined what was the opinion of the profession at that time as to the practice to be pursued in bringing cases to" the Supreme Court. "An examination of the records of" the Supreme Court "in the earlier volumes will show that the prac-

tice above indicated was followed generally by the profession throughout the State, that is, the losing party determined by himself whether he would bring an error of law to" the Supreme Court "by direct bill of exceptions or embody it in a motion for new trial if the ruling was of such a character as could be properly made the ground of such a motion."

It is now contended that, since the passage of the act of 1898, this court has no jurisdiction to entertain a direct bill of exceptions in any case where a verdict has been rendered and a motion for a new trial would be an appropriate remedy, until such a motion has been made and passed upon by the trial judge, except in those cases where it appears distinctly from the bill of exceptions and the record that the ruling complained of was of such a character as to constrain the jury to find the verdict rendered, that is, the ruling must be of such a character that no jury could have legally rendered any other verdict than the one complained of. It is claimed that the effect of the act of 1898 is to abolish altogether the right of this court to review by direct writ of error any other rulings than those of the character above indicated, and that the effect of the act was to work a radical change in the practice which was more or less followed from the time the Supreme Court was established down to the passage of the act of 1898, and even since that date. Our appellate courts have on many occasions commended the practice of making a motion for new trial before filing a bill of exceptions, thus giving to the trial judge an opportunity to review his rulings which are complained of. Neither the Supreme Court nor the Court of Appeals has ever held, so far as we are advised, that it was absolutely necessary to make a motion for new trial in order to give them jurisdiction to review an error of law in a ruling made in the trial of a case. If the act of 1898 be construed as contended for by counsel for the defendant, it would be applicable to very few cases; and

if it be given the construction which we give it, it preserves to litigants a right which has existed ever since the establishment of the Supreme Court. We do not think it was the purpose of the legislature to abolish this long-established practice, nor do we think the language of the act, properly construed, has this effect. In the case of *Taylor v. Reese*, supra, the opinion indicates that it was the opinion of the Supreme Court at that time that the act of 1898 was only declaratory of the existing law, being a recognition of the practice which had long been followed with the approval of the bar and without the disapproval of the bench. It is impossible for anyone to carefully examine the assignments of error dealt with in *Taylor v. State*, supra, which was the case in which the bills of exception referred to in *Taylor v. Reese* were passed upon, and reach the conclusion that the act of 1898 was then construed as is now contended for by counsel for the defendant. None of the rulings which were considered and passed upon in that case were of such a character as to constrain the jury to find the verdict rendered. The alleged errors were, as held in *Taylor v. Reese*, supra, simply of such a character as deprived the accused of a substantial right, and, using the language of the learned Justice who wrote the opinion, "the verdicts actually rendered were necessarily so far controlled by the judge's action as to necessitate a new trial." A careful consideration of the opinion in *Taylor v. Reese* as well as that in *Taylor v. State* cannot lead to any other conclusion than that it was the opinion of the Supreme Court, for which the author of those opinions was speaking, that under the act of 1898 the losing party could by a direct bill of exceptions complain of any error committed during the progress of the trial which deprived him of a substantial right and required a reversal of the judgment of the trial court. These opinions were concurred in by six Justices. It is now claimed that in subsequent opinions a different rule is laid down. Any ruling or language in conflict with the ruling in *Taylor v. Reese*

that may be contained in the cases of *Ocean Steamship Co. v. Hamilton*, *Ray v. Morgan*, and *Darien Bank v. Clarke Lumber Co.*, supra, cannot be treated as modifying the decision in *Taylor v. Reese*, for the reason that none of the decisions named was concurred in by six Justices. There is nothing in *Parker v. Medlock*, 117 *Ga.* 813 (45 *S. E.* 61), to conflict with the view now presented, for the reason that it was simply ruled in that case that a direct bill of exceptions would lie in a case where the ruling complained of controlled the verdict. This was true before the passage of the act of 1898. If there is anything said or ruled in *Smith v. Smith*, 112 *Ga.* 351 (37 *S. E.* 407), *or* in *Cable Co. v. Parantha*, supra, which is in conflict with *Taylor v. Reese*, supra, these decisions must yield to the earlier ruling *Cawthon v. State*, supra.

In the case of *Henderson v. State*, supra, the ruling of the majority in *Cawthon v. State* was somewhat criticised. However, the court in *Lyndon v. Georgia Ry. & El. Co.*, supra, said: "The case of *Henderson v. State* . . . not only produced a diversity of opinions among the members of this bench, but it is feared has been somewhat misapprehended by some of the members of the bar." The majority of the court held that the act of 1898 "sought to provide a brief method for excepting to a verdict or judgment and assigning error on rulings which were necessarily controlling." It was then pointed out that in the *Henderson* case, no attempt was made to except to the final verdict and judgment. However, the bill of exceptions in the Lyndon case assigned error upon the final judgment, and also assigned error on a ruling refusing to allow an amendment, and it was stated that such "erroneous ruling entered into and affected the final judgment, or, as the bill of exceptions alleged, controlled it." The court then said that the plaintiff in error could have said no more. The *Cawthon* case was followed in *Denson v. State*, 150 *Ga.* 618 (104 *S. E.* 780). So we reach

the conclusion that an error of law may be corrected by this court, when brought up for review by a direct bill of exceptions, which assigns error upon the final judgment, where the commission of such error by the court below deprived the losing party therein of a substantial right; and where it is shown that the error is harmful and prejudicial, and necessarily affected the verdict.

2. On October 12, 1933, the defendant took, under sections 5904 et seq. of the Civil Code of 1910, the depositions of S. J. Tillman in Washington, D. C. These depositions were taken before a notary public. It was agreed between the parties at that time that "objections may be interposed to questions and answers at the trial of the case both as to form and substance." This witness refused to answer certain questions propounded to him by plaintiff's counsel on cross-examination, either flatly refusing to answer the same or making flippant and meaningless replies to such questions. Plaintiff contends that he desired correct answers to these questions for the purpose of laying a foundation for impeaching the credibility of this witness. On December 4, 1933, before the case proceeded to trial, plaintiff filed in the trial court his exceptions and motion to suppress these depositions of Tillman, serving, before the trial of the case, counsel for the defendant with a copy of such exceptions and motion. The grounds of these exceptions and motions were that the witness had refused to answer certain questions propounded to him upon cross-examination by plaintiff's counsel, the answers to which would have been material in impeaching the credibility of the witness. The court overruled the motion to suppress the depositions, and allowed counsel for the defendant to read the depositions to the jury; to which ruling and judgment the plaintiff excepts in the bill of exceptions in this case. It appears from the bill of exceptions in this case, as corrected by the trial judge, that it was discovered that there was a defect

in the certificate of the commissioner taking these depositions, and an order was taken sending the depositions back to the commissioner for correction, that at this time counsel for the plaintiff knew of the insufficient answers of Tillman to the questions propounded to him upon cross-examination, and that "plaintiff and his counsel did not file any objections or exceptions to the depositions until the case was announced on trial."

It is true that "It is the right of a witness to be examined only as to relevant matter, and to be protected from improper questions." Civil Code (1910), P. 5870. It is also the duty of an attorney at law to advance "no fact prejudicial to the honor or reputation of a party or a witness, unless required by the justice of the cause with which" he is charged. Civil Code (1910), P. 4965. It has likewise been said that it must not be forgotten that the law has regard for the rights of a witness as well as those of a party. *White v. Knapp*, 31 *Ga. App.* 344 (120 *S. E.* 796). However, it is likewise true that "The right of cross-examination, thorough and sifting, belongs to every party as to the witnesses called against him." Civil Code (1910), P. 5871. This code section is merely a statute declaratory of a principle or rule of ancient standing in the courts of justice. *Atlanta & Birmingham Ry. v. McManus*, 1 *Ga. App.* 302, 305 (58 *S. E.* 258). If the defendant examines a witness on a single point only, it is the right of the plaintiff's attorney to cross-examine such witness on all points; and even if he has been examined by the defendant only on a formal point, yet the plaintiff would have the right to cross-examine such witness as to all points. The rule might be stated to be that when a witness is sworn by one party in chief, the other party has, in general, the right to cross-examine him at large. *Dawson v. Callaway*, 18 *Ga.* 573; *Aiken v. Cato*, 23 *Ga.* 154; *Lunday v. Thomas*, 26 *Ga.* 537, Cross-examination of the witness of an adversary is a substantial right, the preservation of which is

essential to a proper administration of justice, "and extends to all matters within the knowledge of the witness, the disclosure of which is material to the controversy," and it is error to deny or abridge this right. *News Publishing Co. v. Butler*, 95 *Ga.* 559 (22 *S. E.* 282). A denial or abridgment of this substantial right of a party to thoroughly cross-examine a witness of his adversary is a material error and requires the grant of a new trial. *Becker v. Donalson*, 133 *Ga.* 864, 869 (67 *S. E.* 92); 8 *Cum. Dig.* 1038, 1039.

"A witness may be impeached by disproving the facts testified to by him." Civil Code (1910), P 5880; *Middle Georgia &c. R. Co. v. Barnett*, 104 *Ga.* 582, 584 (30 *S. E.* 771). A witness may be impeached by contradictory statements previously made by him. A witness may be impeached by evidence as to his general bad character. Civil Code (1910), PP 5881, 5882. The provisions of these sections of the code are not exhaustive as to the manner in which a witness may be impeached. *Yaryan Rosin Co. v. Haskins*, 29 *Ga. App.* 753 (116 *S. E.* 913). Of course, the ultimate credit to be given to the testimony of a witness is for the jury, after hearing all the evidence, impeaching and otherwise. Civil Code (1910), PP 5883, 5884; *Sappington v. Bell*, 115 *Ga.* 856 (42 *S. E.* 233).

Where it is sought to impeach a witness by himself in order to disparage his testimony, this is properly done by cross-examination of the witness. *Goodwyn v. Goodwyn*, 20 *Ga.* 600. The questions propounded to the witness in this case and which he refused to answer were pertinent for the purpose of affecting the credibility of the witness. *East Tenn. &c. Ry. Co. v. Daniel*, 91 *Ga.* 768 (18 *S. E.* 22). Great latitude should be allowed by the court where the purpose of the interrogatories is to impeach or discredit the witness by showing his bias or prejudice in the case. *Griffin v. State*, 18 *Ga. App.* 462 (89 *S. E.* 537); *Atlanta &c. Ry. v. McManus*, supra; *Floyd v. Wal-*

lace, 31 *Ga.* 688; *Mitchell v. State*, 71 *Ga.* 128 (6), 157. Where the plaintiff in error assigns error upon the refusal of the court to allow a question upon cross-examination, it is not required of him to state what answer was expected of the witness. *Macon Union Co-op. Asso. v. Chance*, 31 *Ga. App.* 636 (122 *S. E.* 66).

A witness may be examined and cross-examined on the taking of depositions or interrogatories in the same manner as in open court. Civil Code (1910), P 5907. The order and scope of the examination of witnesses by depositions shall be in conformity with the rules of the superior court governing the examination of witnesses in trials at law. Civil Code (1910), P 5914. The answer to a question propounded on the taking of interrogatories or depositions should be full and complete and meet every material thing in the question propounded. *McNeill v. Rousseau*, 20 *Ga.* 593.

It was wrong for the witness in this case, on being examined by depositions, to refuse to answer questions propounded to him, unless by answering the same the witness would have incriminated himself. Civil Code (1910), P 5895; *Southern Railway News Co. v. Russell*, 91 *Ga.* 808 (18 *S. E.* 40). It is a contempt of court for a witness to refuse to answer a legal and pertinent question which would be admissible upon the trial of the case in court. Civil Code (1910), P 5910; *Fenn v. Georgia Ry. & El. Co.*, 122 *Ga.* 280 (50 *S. E.* 103); *Smith v. Ferrario*, 105 *Ga.* 51 (31 *S. E.* 38). Where answers to questions propounded to a witness upon cross-examination in depositions or interrogatories are not properly made, the court, upon proper exception thereto by the opposite party, should reject or suppress the same. Civil Code, P 5904; *Williams v. Turner*, 7 *Ga.* 348, 350; *Rogers v. Truett*, 73 *Ga.* 386; *Roberts v. Crowley*, 81 *Ga.* 429, 439 (7 *S. E.* 740). However, an exception to the admission of depositions taken by commission, because of the refusal of the witness to answer certain questions propounded

to him upon cross-examination, is an exception "to the execution and return of the commission," and it "must be made in writing, and notice thereof given to the opposite party before the case is submitted to the jury; provided, the same has been in the clerk's office for twenty-four hours prior to the trial." Civil Code (1910), P 5904; *Pool v. Perdue*, 44 *Ga.* 454, 458; *Schaefer v. Georgia Railroad*, 66 *Ga.* 39, 42. Cross questions must be answered, and if not answered, the execution of the depositions is defective. *Thomas v. Kinsey*, 8 *Ga.* 421. The object of giving the notice is that the other party may have the case continued and the interrogatories re-executed if he deems them material. *Thrasher v. Gazan*, 71 *Ga.* 632 (2b). Where a party fails to comply with the requirements of section 5904, he cannot complain that the trial court declined to suppress depositions because of the want of proper execution. *Galceran v. Noble*, 66 *Ga.* 367; *Langford v. Driver*, 70 *Ga.* 588.

It appears from the bill of exceptions and record in this case that the plaintiff gave to the defendant notice of his intention to except to the interrogatories or depositions of Tillman, before the trial of the case began. In these circumstances, the defendant had opportunity to ask that the case be continued in order that the depositions of this witness be sent back to the commissioner before whom the same was taken in order that the witness might be made to properly answer the pertinent questions propounded to him by plaintiff's counsel. It has been seen that the failure to answer the questions propounded the witness on cross-examination deprived the plaintiff of his right of cross-examination of the witness, and that the same was a material error, and it is the opinion of this court that the exceptions of the plaintiff should have been sustained and the depositions of this witness suppressed. The plaintiff sufficiently complied with the statute when he excepted to the depositions before the trial of the case began, in sufficient time to give the

defendant time to ask for a continuance of the case in order to get the depositions corrected, and the contention of the defendant that the plaintiff knew of the failure of the witness to properly answer the questions at the time the depositions were sent back for a correction in the certificate of the commissioner, but did not file his exceptions thereto until just prior to the beginning of the trial, and was therefore too late, is not well founded and cannot be sustained. It would therefore seem that where the questions propounded by the plaintiff on cross-examination have not been answered by the witness, and the notice of exceptions as provided in section 5904 of the code has been given the opposite party, and such party does not move to continue the case, but proceeds to trial, and the plaintiff assigns error upon the refusal of the court to sustain his exceptions and suppress the depositions of the witness, the refusal of the court to sustain the same and suppress the depositions is error, but not reversible in this case, which is here on a direct bill of exceptions, without a brief of the evidence, and it does not appear but that there was other evidence before the jury, unobjected to, covering the same matters as testified to by the witness Tillman on direct examination.

3. Plaintiff objected to the introduction in evidence by the defendant of the depositions of certain witnesses upon the ground that the testimony therein contained was irrelevant, incompetent, and inadmissible, in that the nature thereof was in justification of the alleged libel and slander charged by the plaintiff to have been committed by the defendant, and that at the time said testimony of these witnesses was taken the defendant had not filed any plea of justification, and that therefore the testimony of these witnesses so taken and incorporated in these depositions was, at the time it was so taken, incompetent and irrelevant to any issue in the case. The court overruled the objections of the plaintiff and allowed the evidence to go

to the jury. In the bill of exceptions error is assigned upon this ruling. It is not shown in the bill of exceptions that the evidence contained in these depositions was the only evidence adduced upon the trial by the defendant to the effect that he was justified in publishing the libel charged by the plaintiff because the same was in fact true. If there was other evidence before the jury, unobjected to, tending to support defendant's plea of justification, which was later filed, the admission of these depositions in support thereof would not necessarily be a reversible error. Of course, if there was but slight evidence, or doubtful evidence, or evidence that was not clear and convincing, before the jury upon the issue of justification, the introduction of the depositions of these witnesses to the effect that the defendant was speaking and publishing the truth concerning the plaintiff would not be harmless. However, there is no brief of the evidence before this court, and it does not appear from the bill of exceptions but that there was such other evidence, clear and convincing, upon which the jury could well have planted their verdict, and, in these circumstances, the plaintiff does not show a harmful and injurious error in the introduction of this testimony. As to the question of the depositions being inadmissible in evidence in this case, see *Realty Construction Co. v. Freeman*, 174 *Ga.* 657, 659 (163 *S. E.* 732). On the question of the admission of such depositions in evidence constituting a harmless error, see *Matthews v. Richards*, 19 *Ga. App.* 489 (2) (91 *S. E.* 914); *Smith v. State*, 23 *Ga. App.* 76 (97 *S. E.* 454); *L. & N. R. Co. v. Lovelace*, 26 *Ga. App.* 286 (106 *S. E.* 6); *General Tire & Rubber Co. v. Brown Tire Co.*, 46 *Ga. App.* 548 (168 *S. E.* 75).

4. The plaintiff contends that the court erred in allowing the defendant to have the opening and concluding argument before the jury. The case is in this court upon direct bill of exceptions, and in this regard the bill of exceptions merely

recites that "during the trial of the case, the court, over objection" of the plaintiff, allowed the defendant the opening and concluding argument. The bill of exceptions does not show at what stage of the trial this occurred. It is incumbent upon the plaintiff to affirmatively show in his bill of exceptions that the court erred in this respect. "Where the defendant assumed without objection the burden of proof, it was not error to allow him to open and conclude the argument before the jury. Even had the right to open and conclude been originally with the plaintiff, he waived it by acquiescing in the assumption by the defendant of the affirmative on the proof." *Willingham v. M. & B. Ry. Co.*, 113 *Ga.* 374 (38 *S. E.* 843); *Abel v. Jarrett*, 100 *Ga.* 732, 737 (28 *S. E.* 453); *Northington v. Granade*, 118 *Ga.* 584 (2) (45 *S. E.* 447); *Jones v. Fourth National Bank*, 20 *Ga. App.* 219 (92 *S. E.* 964). This being true, if the defendant had assumed the burden, it was not error for the court to rule as he did in this case. The plaintiff does not show in his bill of exceptions, as it was incumbent upon him to show, that the court erred in this respect.

5. The defendant in his cross-action alleged that the plaintiff had published certain defamatory statements concerning him in the newspapers, over the radio, by means of handbills and through the use of slides in motion-picture theaters, in which he charged that the defendant's reputation as a "frame-up artist" was well known to the people of Fulton County, and that he "framed" Jack Lance for the murder of Bert Donaldson. In his answer the plaintiff alleged that the statements published concerning the defendant among which was the statement above referred to, were privileged, in that "said statements were made with the bona fide intent of the part of the plaintiff to protect his own interest in a matter where it was concerned, and . . . said statements constituted comments upon the acts of the defendant as a public man, in his public capacity as solicitor-

general of the Atlanta Judicial Circuit of the State of Georgia, and with reference thereto; that as such public officer defendant's official conduct is open to public criticism, and that plaintiff made such comments upon the defendant's official conduct in good faith and without malice, because, as plaintiff will show, the official conduct of the defendant, known to the plaintiff, together with information obtained by the plaintiff from the public records and newspapers published in Fulton county, and from other reliable sources, prior to the making of such comments, led the plaintiff to believe, and plaintiff did believe, that the criticisms so made by plaintiff of and concerning the defendant's official conduct were fair, just, and proper, and in the public interest." No demurrer to this portion of the answer of the plaintiff to defendant's cross-action was interposed by the defendant. On the trial plaintiff offered to testify as follows: "Prior to the time that I made the charges that John A. Boykin's reputation as a frame-up artist was well known to the people of this county, and that he 'framed' Jack Lance for the murder of Bert Donaldson, as stated in the answer to the cross-bill and attached exhibits, I had read certain newspaper articles printed in the Atlanta Journal, a daily newspaper published in the City of Atlanta and circulated generally in this county, and I had inspected certain official public records of Fulton county, and the information I obtained by the reading of these newspaper articles and the inspection of the official public records of Fulton county, together with other information which I obtained from reliable sources, led me to believe and I did believe that John A. Boykin's reputation as a frame-up artist was well known to the people of this county and that he 'framed' Jack Lance for the murder of Bert Donaldson." In this connection the plaintiff offered to introduce in evidence the original newspaper articles read by him, and upon objection of the defendant that the articles and plaintiff's proffered testimony were irrelevant and immaterial to the issues in the case, the court excluded

the same from the jury, and to this ruling of the court the plaintiff excepts in the bill of exceptions in this case on the ground that having filed a plea of privilege to defendant's cross-action, the excluded newspaper articles were relevant to throw light upon the character of the occasion and to show where the plaintiff obtained the information and that it was in his possession at the time he made the statements concerning the defendant, and were admissible generally in support of the allegations in his plea of privilege; and that such action by the court prevented the jury from considering these newspaper articles, which referred to a long series of transactions in which the defendant figured, and entered into and affected plaintiff's bona fide belief in the truth of the statements published by him of and concerning the defendant.

"The following are deemed privileged communications: 1. Statements made bona fide in the performance of a public duty. 2. Similar statements in the performance of a private duty, either legal or moral. 3. Statements made with the bona fide intent, on the part of the speaker, to protect his own interest in a matter where it is concerned. 4. Fair and honest reports of the proceedings of legislative or judicial bodies. 5. Comments of counsel, fairly made, on the circumstances of his case, and the conduct of parties in connection therewith. 6. Comments upon the acts of public men, in their public capacity, and with reference thereto." Civil Code (1910), P 4436. Plaintiff alleges in his answer to the cross-action of the defendant that the statements published by him concerning the defendant were privileged. He sets up that said statements were made with the bona fide intent on the part of the plaintiff to protect his own interest in a matter where it was concerned, and because said statements constituted comments upon the acts of the defendant as a public man and in his public capacity. In other words plaintiff avers that the statements were privileged under

sub-paragraphs 3 and 6 of the above section of the code. It appears from the record that the statements were made by the plaintiff in a heated political race in which he was a candidate for the office of solicitor-general of the Atlanta Judicial Circuit, held by the defendant, and for which the defendant was a candidate to succeed himself. Therefore, said statements, plaintiff alleges, were made bona fide to protect his own interest in a matter where it was concerned. "To make the defense of privilege complete in an action of libel, good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only, must appear . . . All of these questions are, however, questions of fact for the jury to determine, according to the circumstances of each case, under appropriate instructions from the court." *Sheftall v. Central of Ga. Ry. Co.*, 123 *Ga.* 589, 592 (51 *S. E.* 646). The question whether the person claiming privilege, under this sub-paragraph of the code section, acted with a bona fide intent is a question of fact to be submitted to and determined by a jury. *Holmes v. Clisby*, 118 *Ga.* 820, 825 (45 *S. E.* 684). As to the defense under sub-paragraph 6 of said code section, where the statements are alleged to have been a comment upon the acts, in his public capacity, of a man holding a public office, see *Williams v. McIntosh*, 33 *Ga. App.* 105, 108 (125 *S. E.* 864), S. c. *McIntosh v. Williams*, 160 *Ga.* 461 (128 *S. E.* 672). Where a statement is pleaded as privileged, all facts calculated to throw light upon the true character of the occasion are admissible. *Jones v. Forehand*, 89 *Ga.* 520 (2) (16 *S. E.* 262). If the statement or charge made by the plaintiff concerning the defendant was made in good faith and without malice by the plaintiff to protect his interest as a taxpayer, then the defendant could not recover on his cross-bill. *Pearce v. Brower*, 72 *Ga.* 243; *Augusta Evening News v. Radford*, 91 *Ga.* 494 (17 *S. E.* 612, 20 L. R. A. 533, 44 Am. St. R. 53). The question of privilege is

one which must be raised by plea and submitted to a jury as an issue of fact. *Flanders v. Daley*, 120 *Ga.* 885 (48 *S. E.* 327). Whether the plaintiff acted in good faith and with a bona fide intent, or published the statements concerning the defendant wilfully and maliciously, and whether or not there was probable cause for the belief on the part of the plaintiff that the source of information received by him was reliable and trustworthy, were all questions of fact which a jury alone could pass upon. "Whether the facts were sufficient to justify, mitigate, or to render privileged, either absolutely or conditionally, the publication" of the statements which the defendant contended were libelous, were questions for the jury. In *McIntosh v. Williams*, supra, it was specifically ruled that "The facts pleaded . . . to establish the privilege claimed . . . need not be the same as those stated in the libel." In *Deckner-Willingham Lumber Co. v. Turner*, 171 *Ga.* 240, 244 (155 *S. E.* 1), on the question of proving the want of malice, it was ruled that "Similar acts are admissible in evidence, if committed or proposed at or about the same time, and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the petition . . . This is so in transactions of a similar nature or like character in which the defendant had engaged previously to the one in question . . . Intent, good faith, motive, and other such matters relating to the state of a person's mind are usually not easily susceptible of direct proof. But frequently the state of mind accompanying the doing of an act is illustrated by other acts of a similar nature, done or proposed by the defendant in such a way as to indicate a general practice or course of conduct, or as to display motive, knowledge, intent, good faith, and a variety of other such things . . . Other transactions showing fraud are admissible to show intent . . ."

The defendant alleges in his cross-action that the statement

published by the plaintiff was a false and malicious defamation, wilfully intended to injure him in his individual and official capacity as solicitor-general. "Whether or not there was probable cause for the belief on the part of the defendant that the information received by it was entirely reliable and trustworthy, and whether it acted in perfect good faith, or published the article wilfully and maliciously with the intent alleged, were questions of fact which the jury alone could pass upon." *Augusta Evening News v. Radford*, supra. Therefore, from what has been heretofore stated, it would seem that it is manifestly a question for the jury to pass upon, under appropriate instructions from the court, whether under the allegations of the pleadings and the evidence offered by the plaintiff, under which he claimed that the statements made by him of the defendant were privileged, were sufficient to show privilege, absolute or conditional, or whether such facts were sufficient to entitle the plaintiff to mitigation of damages by the absence of malice, that is whether or not the statement was published by plaintiff of defendant without malice. It is for the jury to determine the weight and the credibility of the evidence. If from these "facts the jury could find that the plaintiff made the statement concerning the defendant in good faith and under such circumstances as to entitle the plaintiff either to a finding in his favor on this issue or to a mitigation of the damages, he would be entitled to have the jury consider the information and the sources thereof, on which he alleges, he relied in making the statement concerning the defendant, to see whether or not the plaintiff acted in good faith or bad faith in making the same. See *Pearce v. Brower*, 72 *Ga.* 243, 245.

However, even though said evidence be admissible, and even though it was improper for the trial judge to have excluded the same, it was incumbent upon the plaintiff, in assigning error upon the exclusion of this evidence in a direct bill of exceptions,

to affirmatively show that the exclusion thereof harmed and prejudiced him, and worked substantial injury to his case by depriving him of the evidence necessary to sustain his plea of privilege, or to mitigate the damages, and therefore deprived him of his defense to defendant's cross-action, on which the verdict in this case was based. If the trial judge's action in excluding the evidence had the effect of depriving the plaintiff of a substantial right, that is of his defense to the cross-action, or his right to have the damages mitigated, the same would necessarily be such an error as entered into and affected the verdict. Plaintiff does not show but what there was other evidence upon this same issue before the jury. In fact, it appears from plaintiff's plea on this issue and from his evidence that he obtained information not only from the newspaper articles and public records, but also from "other information which I obtained from reliable sources." So it does not affirmatively appear from the bill of exceptions but that the plaintiff was allowed to introduce other evidence along this line in support of his plea of privilege. There was no brief of the evidence adduced upon the trial sent to this court with the bill of exceptions in this case. We are of the opinion, therefore that under the principles laid down from the foregoing authorities this evidence was admissible, but that the plaintiff does not affirmatively show in this case that the exclusion thereof by the trial court was such an error as this court will consider reversible upon a direct bill of exceptions.

What is ruled above as to the newspaper articles, necessarily applies to the exclusion by the trial judge of the two original indictments against Harry C. Page, the indictment against Fred Moyne, certain entries on the original jail docket kept by the sheriff of Fulton County, the original accusation and sentence in the case against J. R. Ward, and the photostatic copy of the letter from the defendant to Ed. O. Ellis, which were offered

by the plaintiff as tending to support his plea of privilege, and which were rejected by the trial judge upon the same ground that the newspaper articles were rejected.

6. Plaintiff in error requested the trial judge, in writing, before he began to charge the jury in this case, to instruct them on the definition of the offense of bribery, as set forth in Our Penal Code, to wit "Bribery is the giving or receiving any undue reward to influence the behavior of the person receiving such reward in the discharge of his duty in any office of government or of justice." Penal Code, P 270. In order to pass upon and determine whether a requested instruction to the jury is pertinent and should have been given, it is usually necessary to refer to the evidence adduced upon the trial. *Wood v. Owen*, 133 *Ga.* 752 (2) (66 *S. E.* 951); *S. A. L. Ry. v. Gnann*, 142 *Ga.* 381 (82 *S. E.* 1066). In this case, however, which is here on direct writ of error, and where error is assigned upon the refusal of the court to give the above principle in charge to the jury, it is recited in the bill of exceptions that the requested charge was "pertinent to the evidence . . . in that both plaintiff in error and the defendant had charged each other with guilt of the crime of bribery, and the issues in said case were the guilt of the plaintiff and the defendant of the crime of bribery," and the certificate of the trial judge to the bill of exceptions recites that the same was true and contained and specified all of the record necessary to a clear understanding of the errors complained of. It is true that knowledge, in a general sense, of what constitutes bribery is possessed by most of our citizens, and that practically all people now serving as trial jurors understand, when a person is charged with being guilty of bribery, generally what is meant by the charge. It would therefore not have been error, in any sense, for the court to have failed to instruct the jury as to the definition of bribery, without a timely written request therefor. However, it is the duty of

the trial court to give to the jury pertinent, correct, and applicable requested instructions where they are timely made in writing, and the principles embodied in such requests are not sufficiently covered by the general instruction of the court. *McCrea v. Georgia Power Co.*, 46 *Ga. App.* 276 (167 *S. E.* 540); *Perdue v. State*, 17 *Ga. App.* 299 (86 *S. E.* 661). The charge of the court in this case is not before this court, and the bill of exceptions does not recite that the principle embodied in the requested instruction in this case was not substantially covered by the trial judge in his general instructions in the case. In these circumstances, this assignment of error does not sufficiently show that the plaintiff has been harmed by the failure of the court to charge as requested.

7. On December 18, 1933, two days before counsel began their arguments to the jury in said case, plaintiff presented to the clerk of the trial court, who in turn delivered the same to the trial judge, a paper entitled in the cause, which read in part as follows: "Now comes the plaintiff above named, and before the court begins its charge, and before the arguments of counsel begin, makes and files this his request that the court give its charge in writing to the jury." Then followed in a separate paragraph the request of the plaintiff that the court give in charge to the jury the following separate pertinent requests to charge. Then followed 11 requests to charge. The court made an entry of receipt thereon, dated December 18, 1933, by initialing the same "H. M. D." By direction of the court the following was added to the bill of exceptions in connection with this assignment of error: "Upon examining the paper the judge saw that it was separate requests to charge. He thereupon studied the separate requests and made the notations on them shown on the paper. He did not read the first paragraph, presuming that the portion of the paper there set out was a mere statement of the case. The first time the judge

actually knew that there was anything in the paper about a written charge was when his secretary stated to the judge that counsel for the plaintiff had stated that such a request had been made. This was after the jury had been charged and had retired, but before a verdict had been rendered. The judge sent for plaintiff's counsel and stated to him that he was not aware of any such request being made. The plaintiff's counsel stated that it had been made. This paper . . . was then referred to and the judge's attention called to the first paragraph. The judge thereupon said he had not seen this statement before. Plaintiff's counsel stated that it was not a trick, but was made bona fide. Plaintiff's counsel further stated that it would not amount to anything, as they were not going up on a motion for a new trial, but plaintiff's counsel added that plaintiff was not waiving anything. At the time this statement was made by plaintiff's counsel the judge, if he had construed the request as amounting to a request that he write out his charge and read it to the jury, and file it with the clerk could have brought the jury in if he had not understood that the request would not be insisted upon, and could have withdrawn the charge as given verbally and as taken down by the official reporter, and could have instructed the jury to disregard the same, and could have written out his charge and read it to the jury . . . Plaintiff's counsel did not himself hand the paper to the judge and did not at any time before the charge was delivered call the judge's attention to there having been made to the court a request for a written charge, though counsel did ask the court if the court had received plaintiff's requests. After the conclusion of all the arguments and just before the charge was commenced and after the jury was reconvened for the sole purpose of hearing the charge, plaintiff's counsel arose and verbally and in writing (which written request is appended to the bill of exceptions in this case and properly identified by the trial judge) requested the court to instruct the jury relative to a certain section of the

Florida law, which he read to the court in the presence of the jury. At this time plaintiff's counsel did not suggest the necessity for putting the charge so requested in writing, nor did plaintiff's counsel suggest that there had been any issue along this line. At the conclusion of the charge as given by the court, the question arose of permitting the jury to render a verdict in the absence of the court. The plaintiff's counsel expressed his willingness for a verdict to be received in the absence of the court. The defendant's counsel was unwilling for this to be done unless the jury were furnished written forms which they could follow as models in rendering whatever verdict they might determine to render. Thereupon certain forms covering the different possible verdicts in this case were prepared and agreed upon by counsel, and the court then had these written forms handed to the jury, and verbally instructed the jury as to the use of these forms. At the time this occurred, with the consent of counsel for both sides, no suggestion was made to the court by plaintiff's counsel that he had requested a written charge, or that anything was being done contrary to any request as to the manner of charging the jury, but, on the contrary, the plaintiff's counsel expressly agreed to what has just been stated."

Plaintiff assigns as error the failure of the court to give its charge to the jury in writing—that is, write out its charge and read the same to the jury and file it with the clerk. Plaintiff sets up in the bill of exceptions "that the verdict of the jury was not demanded by the evidence, there being issues of fact to be decided by the jury; that neither party made a motion for a nonsuit or a directed verdict, and the court did not of its own motion nonsuit or direct a verdict for either party. To the failure of the court to deliver its charge in writing, as requested by the plaintiff in error . . . and to the failure of the court to file a written charge with the clerk, plaintiff in error then and there excepted, now excepts, and assigns the same as

error, and says that the failure of the court to give its charge in writing to the jury, in accordance with the request . . . which plaintiff in error contends was a request to reduce the charge of the court to writing, and to the failure of the court to file a written charge with the clerk after same had been delivered, plaintiff in error then and there excepted and now excepts, and assigns the same as error, and the failure of the court to reduce its charge to writing and read the same to the jury, and the failure of the court to file a written charge with the clerk, being controlling, entered into and affected the further progress and final result of the case, and the court erred in receiving the verdict and . . . in entering judgment based thereon."

There is now and has been since 1860 a statute of force in this State upon this subject. The Civil Code (1910), P. 4847, provides that "The judges of the superior courts of this State, shall . . . on the trial of all civil cases tried before them, give their charges to the jury in writing; that is to say, shall write out their charges and read the same to the jury, when the counsel for either party shall require them to do so; and it shall be error for such judge to give any other or additional charge than that so written out and read." The request in this case that the court give its charge in writing to the jury was a sufficient compliance with the above statute. As soon as the charge of the court is thus written out and read to the jury by the trial judge, he shall file the same with the clerk of the court. Civil Code (1910), P 4848. All rules and modes of procedure, pleading, and practice prevailing in the trial of cases in the superior courts of this State shall apply to and be applicable in the trial of suits in the city court of Atlanta, Ga. L. 1871-2, pp. 56, 58, 63. At the outset counsel for the defendant state that it was not error for the court to fail to give his charge to the jury in writing in this case, because counsel for the plaintiff did not inform counsel for the defendant that he was going to request the court

to give the charge to the jury in writing and did not submit such request to counsel for the defendant. We do not think that this contention is well founded. See Civil Code (1910), P 6084. The law as to the giving of a charge in writing by the court, when properly requested by counsel for either side, is mandatory in its terms, and the court cannot refuse to do so when requested. Courts have recognized oral requests to write out the charge as being sufficient. It could have availed counsel for the defendant nothing for counsel for the plaintiff to have submitted this paper to them; they could not have seriously objected to the court's writing the charge and reading it to the jury, it being the mandatory duty of the court to comply with the above statute when properly requested by counsel for the plaintiff.

Did the fact that the court did not read the paper handed to him by the plaintiff's counsel excuse the failure of the court to write out his charge in the case? We do not think so. The judge supposed that he was being handed specific requests to charge isolated principles of law on behalf of the plaintiff, as provided by section 6084 of the Code. It would be a safer policy for every trial judge, upon being given written requests to charge, to closely peruse the same and determine if they are applicable pertinent principles of law. It is often that failure to give in charge to the jury a principle of law will not require the grant of a new trial; yet, where the same principle is embodied in a written request to charge, duly and timely presented to the court, it would be a reversible error to refuse to give the same in charge to the jury. The object of section 4847 of the Code is to prevent misunderstanding between the trial court and counsel as to what was the charge; and the only way to prevent such disputes from arising is to require the trial judge to conform strictly to this statute. See *Fry v. Shehee*, 55 *Ga.* 214. Chief Justice Bleckley, in writing the opinion of the

court in *Wheatley v. West*, 61 *Ga.* 401, 408, said: "These sections of the Code stand as a kind of constitutional law between bench and bar. They entitle the counsel to have the written word, instead of oral tradition. They provide for preserving and handing down the word as a sure and enduring memorial of what was actually delivered. There is to be no controversy over the text of the charge; no uncertainty as to what revelation fell from the bench into the jury box. The judge is not to speak, but to read: and when his manuscript is exhausted he is to become silent. It would seem that if counsel cannot depend upon the guaranty afforded them by these sections of the Code, they can depend upon no promise made to them in the law. If they cannot get a written charge, what can they get? What are they to trust in the whole compass of the statutes, if they are to be disappointed when they cite such peremptory language as that found in these two sections?" As following this ruling, see *Homer v. State*, 6 *Ga. App.* 667 (65 *S. E.* 701). "The defendant below having requested the presiding judge on the final trial to give his charge to the jury in writing, it was error not to write out and read to the jury whatever instructions the court had to give them." *Harris v. McArthur*, 90 *Ga.* 216 (15 *S. E.* 758). This decision was overruled by the Supreme Court insofar as it held that it was error in a case where the evidence demanded the verdict for the plaintiff to orally direct such a verdict, where the court had been requested to give its charge in writing. *Geer v. Dancer*, 148 *Ga.* 465 (97 *S. E.* 406). "When the court has been duly requested to give its entire charge in writing, and the jury, after deliberating for a while on the case, ask for additional instructions, which the court undertakes to give, these instructions must also be reduced to writing and read to the jury." *Bowden v. Achor*, 95 *Ga.* 243 (13) (22 *S. E.* 254); *Mauldin v. Gainey*, 15 *Ga. App.* 353 (3) (83 *S. E.* 276). The failure of the court to give the additional instructions in writing is a reversible error. *Bowden v. Achor*,

supra. "An oral request that the charge of the court as a whole be reduced to writing and read to the jury is sufficient to invoke the statutory requirement which inhibits a trial judge from giving to the jury any other additional charge than that so written and read." *Citizens Bank v. Fort*, 15 *Ga. App.* 427 (2) (83 *S. E.* 678). The trial judge erred in failing to reduce his charge to writing and read the same to the jury, when so requested, which error ordinarily requires the grant of a new trial, *Jones v. State*, 65 *Ga.* 506; *Burns v. State*, 89 *Ga.* 527 (15 *S. E.* 748); *Central of Ga. Ry. Co. v. Perkerson*, 115 *Ga.* 547. Under section 4847 of the Code, where the judge is requested to put his charge in writing, he violates the statute, and a new trial must be granted, if he gives to the jury any instruction, not in writing, as to how they shall consider the case to be submitted to them, or how they shall make a verdict. *Walker v. State*, 10 *Ga. App.* 85 (72 *S. E.* 531). The requirement of the Code, that the judge shall, when requested by counsel for either party, write out his charge and read it to the jury, is mandatory, and when such a request is made it is error to give a charge in any other manner. *Brindle v. State*, 17 *Ga. App.* 741 (88 *S. E.* 460).

The judge cannot deprive the party of this right on the ground that he has not time to comply with the request. "We sympathize, of course, with the judges when unusual and unreasonable requests are made of them by counsel; and we appreciate that it would add to their labors if they had to write out every charge delivered in each case tried by them; but the law is the law, and when counsel invoke it, all must obey it." *Homer v. State*, supra. It was there said that "any decision, sentence or decree of the court" was broad enough to include a refusal to deliver a written charge; and that the court, having refused to write out the charge as requested, erred, and "a new trial is mandatory." The failure to write out the charge, when timely requested so to do by counsel, is a reversible error, unless the evidence de-

manded the verdict as rendered. *Forrester v. Cocke*, 6 *Ga. App.* 829 (65 *S. E.* 1063); *Walker v. State*, 8 *Ga. App.* 214 (68 *S. E.* 873); *Ashley-Price Lumber Co. v. Henry*, 23 *Ga. App.* 93 (98 *S. E.* 185). The trial judge has no discretion. He must write out his charge and read it to the jury. *Wheatley v. West*, supra; *Bank v. Kent*, 57 *Ga.* 285; *Fields v. Carlton*, 75 *Ga.* 556; *Campbell v. Miller*, 38 *Ga.* 304; *Gray v. Obear*, 54 *Ga.* 231; *Fry v. Shehee*, supra. As was held in *Wheatley v. West*, supra, "The complaint is that the whole oral charge was illegal because the case was one for a written charge and no other. What objection to a charge is more fatal than that every syllable of it was delivered contrary to law."

It therefore follows that the court erred in not writing out his charge and reading the same to the jury in this case. The bill of exceptions reciting that the "verdict of the jury was not demanded by the evidence, there being issues of fact to be decided by the jury," and the certificate of the trial judge certifying that the bill of exceptions is true and correct and contains or specifies all of the record necessary to a clear understanding of the errors complained of, we think that the error of the court in failing to write out his charge and read it to the jury, when requested by counsel for the plaintiff before the arguments began, was such error as to require the grant of a new trial in a case brought to this court upon direct exceptions to such ruling as being controlling and as affecting the final verdict in the case, no motion for new trial being made in the court below. It is no excuse for the failure of the trial judge to write out his charge to the jury that the official court reporter took down the charge as uttered, and that this constituted a sufficient compliance with the purpose and intent of the statute, that purpose and intent being "to preserve a true memorandum of what was actually charged." *Wheatley v. West*, supra. As to this point the Supreme Court in *Wheatley v. West* held that "As to substituting

stenographic reporting in place of first writing, and then reading the charge as written, that is for the General Assembly, and not for the judiciary." In *Bowden v. Achor*, supra, it was held that "The law providing for the appointment of official court reporters may offer good reason for a repeal of section 244 of the Code (now section 4847); but as matter of fact that section has never yet been repealed by the legislature." In *Brindle v. State*, supra, it was said that the provisions of the statute "are not complied with by directing the official stenographer of the court to take down, in the course of the trial and as delivered to the jury, the oral utterances of the judge in his charge. Of course the judge may, for his own convenience, dictate to the stenographer what he intends to read to the jury, and have it transcribed, so that he can read it, but the charge must be reduced to a legible condition and placed in a form in which it can be 'known and read of all men,' before the judge delivers it by *reading* it to the jury. In most cases the instructions of the trial judge as orally delivered are stenographically reported and thereafter transcribed, as there may be occasion for a review of the charge. However, in order to show that this ordinary mode of procedure would not be a compliance with the provisions" of the statutes on this subject, "it is only necessary to point out that where the charge is merely taken down stenographically during its delivery, it would be impossible for the judge, as required by law, to immediately hand a copy of his charge in writing to the clerk to be filed as a part of the record. Furthermore, to permit a stenographer, after the mere oral delivery of a charge, to reduce to writing, according to his measure of ability as a stenographer, what the judge may have orally stated to the jury would not prevent 'controversy over the text of the charge;' which, as pointed out by Judge Bleckley in *Wheatley v. West*, 61 Ga. 408, is one of the important purposes to be subserved by the statute."

We come now to consider whether counsel for the plaintiff waived his right to have the judge write out his charge and read the same to the jury. It is cogently insisted by the defendant that this is the true interpretation to be placed upon the conduct of counsel for the plaintiff. As had been shown hereinbefore, after the jury had been charged and were deliberating on their verdict, the trial judge first found out that counsel for the plaintiff had filed a written request to him to write out his charge. He then sent for plaintiff's counsel and informed him that he did not know of the request and had not seen the request before. Plaintiff's counsel stated that it would not amount to anything, as they were not going up on a motion for a new trial, "but plaintiff's counsel added that plaintiff was not waiving anything." At this time the trial judge, if he had construed the request as amounting to a request that he write out his charge, read it to the jury and file it with the clerk, could have brought the jury in "if he had not understood that the request would not be insisted upon, and could have withdrawn the charge as given verbally and as taken down by the official reporter, and could have instructed the jury to disregard the same, and could have written out his charge and read it to the jury." The bill of exceptions here recites, by direction of the trial judge, that "As a matter of fact, practically the entire charge as given, and all of it except the more or less formal parts had been written out by the judge and read to the jury, and this writing is available. It would have been very easy for the judge to have completed and read the entire charge to the jury and filed it with the clerk; and counsel for plaintiff in error could have made a motion for new trial. Plaintiff's counsel did not himself hand the paper to the judge and did not at any time before the charge was delivered call the judge's attention to there having been made to the court a request for a written charge, though counsel did in the progress of the case ask the court if the court had received plaintiff's requests." At the

conclusion of the charge the court verbally instructed the jury as to the use of certain forms for their verdict, which forms had been agreed upon by counsel. "At the time this occurred . . . no suggstion was made to the court by plaintiff's counsel that he had requested a written charge, or that anything was being done contrary to any requests as to the manner of charging the jury."

In the case of *Wheatley v. West*, supra, the trial judge certified that at the opening of the case counsel for the defendant requested the court to write out his charge to the jury and read the same, but that the charge was not so written out and read to the jury because the court was of the impression that counsel for the defendant had afterwards agreed that the stenographer should take the charge down as delivered, and that said charge was taken down verbatim by the stenographer. In that case the Supreme Court held "The Code entitles the counsel of either party, on the final trial of a civil case, to request that the charge of the court to the jury be delivered in writing, and to have it so delivered. In this case, the request was made, and the court failed to comply with it, being under the impression that the request was waived. What produced this impression is not stated, and it seems that, though the request itself was an absolute certainty, the supposed waiver of it was altogether uncertain. A doubtful waiver can not defeat a right which has become vested to the exclusion of all doubt. The request came in due time, and was express. Unless it was expressly waived or withdrawn, the court should have complied with it. Not to comply was the denial of a clear statutory right; how clear, can be seen by a mere glance at" the statute,—sections 4847 and 4848 of the Civil Code of 1910. As shown hereinbefore in this opinion, the court held in that case that the error of the court in failing to write out his charge and read it to the jury was fatal, and required the grant of a new trial to the defend-

ant therein. So far as we have been able to ascertain this decision of the Supreme Court has never been questioned or doubted, but, on the contrary, has been followed by that court and by this court in many subsequent decisions. We can not justly hold that the above-described conduct on the part of plaintiff's counsel amounted to an "express waiver" or withdrawal of the timely given request for the court to write out his charge and read the same to the jury.

It appears from the bill of exceptions that just before the charge was commenced the plaintiff's counsel "arose and verbally and in writing requested the court to instruct the jury relative to a certain section of the Florida law, which he read to the court in the presence of the jury. At this time, plaintiff's counsel did not suggest the necessity for putting the charge so requested in writing, nor did plaintiff's counsel suggest that there had been any request along this line." It further appears that at the conclusion of the charge there arose a question as to permitting the jury to return their verdict in the absence of the court, that counsel for the plaintiff agreed for this to be done, but that counsel for the defendant was unwilling for it to be done unless the jury were furnished certain forms which they could follow, that counsel for both parties agreed upon the forms of verdict, that the court then verbally instructed the jury as to the use of these forms, and that the plaintiff did not at the time suggest to the court that he had requested that the charge to the jury be written and read to the jury. We do not think that this amounted to an express waiver of the written request for a charge in writing, which was presented to the court before the arguments began. Where counsel for either party, who has duly requested the court for a written charge, orally requests the court to deliver a certain additional instruction, and the court thereupon orally instructs the jury along the line requested, this does not constitute a waiver on the part

of such party of his right to have the general charge of the court written out and read to the jury, but it does constitute a waiver on the part of such party of his right to have such oral request written out, and it is not error for the court to orally charge the jury along the line suggested by such oral request. See *Continental National Bank v. Folsom*, 67 *Ga.* 624. In none of the following cases was it held that where a party has requested that the court put its entire charge in writing and read it to the jury, and such party subsequently orally requests an additional instruction, and the court orally gives such requested instruction, that such action on the part of the party waived the timely request given to the court that the charge be put in writing and read to the jury. *Hicks v. State*, 105 *Ga.* 627 (31 *S. E.* 579); *Fletcher v. State*, 43 *Ga. App.* 405 (159 *S. E.* 126); *Partee v. State*, 19 *Ga. App.* 752 (92 *S. E.* 306); *Griggs v. State*, 17 *Ga. App.* 301 (86 *S. E.* 726). In these cases the defendant requested a particular instruction of the court, which was erroneous, but which the court gave in charge to the jury. In these circumstances, it was properly held that the defendant could not complain of the action of the court in giving such requested instruction to the jury, the error being brought about by the defendant's action. There is nothing in the case of *Galceran v. Noble*, 66 *Ga.* 367 (4), to the contrary of the ruling in this case. In that case it was held that the fact "that the court added to his written charge, by request of plaintiff's counsel, is no ground for exception by him." There the court did not hold that it was not error for the court to fail to give the main and general charge in writing, as requested by the plaintiff, but held that it was not error for the court to give the additional charge orally, because the defendant had requested such instruction. In other words, the giving of the additional instruction orally was error, but it was error at the plaintiff's own invitation.

The cases of *Theis v. State*, 45 *Ga. App.* 364 (2) (164 *S. E.*

456); *Caswell v. State*, 27 *Ga. App.* 78 (2) (107 *S. E.* 562); *Harris v. State*, 11 *Ga. App.* 137 (74 *S. E.* 895); *Thompson v. State*, 20 *Ga. App.* 177 (7) (92 *S. E.* 959), and *Cumming v. State*, 155 *Ga.* 346 (2) (117 *S. E.* 378), are not authority for holding that the plaintiff in this case had expressly waived or withdrawn his timely written request that the court write out the charge and read the same to the jury, by reason of his acts or silence, and because he did not expressly ascertain whether the court had read his request to write out his charge. The plaintiff in this case had made his request for the court to write out the charge as required by the statute. While the court was charging the jury the plaintiff could not very well know but that the court had written out his charge and was reading it to the jury, the bill of exceptions showing that most of the charge as given, except the formal parts, was actually written out and read to the jury. However, even if it could be held that the court had sufficiently complied with section 4847 of the Code by having most of the charge, all but the formal parts, written out and by reading the same to the jury, it does not appear that the charge was delivered to the clerk of the trial court as soon as delivered, in compliance with section 4848, which of itself constitutes reversible error. *Ashely-Price Lumber Co. v. Henry*, supra.

This court has read the decisions in *Schumpert v. State*, 9 *Ga. App.* 553 (2) (71 *S. E.* 879); *Trollinger v. State*, 38 *Ga. App.* 357 (144 *S. E.* 129; *Benton v. State*, 31 *Ga. App.* 781 (122 *S. E.* 97), and *Wilson v. State*, 176 *Ga.* 198 (167 *S. E.* 111), wherein silence of the accused was held to amount to a waiver of his right as to a selection of the jury, although at the outset of the trial he had declared that he waived nothing. These decisions are not authority for a contrary holding in this case, and that the plaintiff had "expressly waived" his timely written request that the court write out the charge and read the same to the jury.

In *Lane v. State*, 9 *Ga. App.* 294 (70 *S. E.* 1118), the defendant's counsel, who had previously requested that the court write out his charge and read it to the jury, before the court began the charge, went to the bench and informed the court that he "need not trouble to write the charge out." Of course, this constituted an express waiver and a withdrawal of the previous request that the court write out the charge and read it to the jury.

The decisions in *Sizer v. Melton*, 129 *Ga.* 143 (58 *S. E.* 1055); *Roberts v. Atlanta Con. St. Ry. Co.*, 104 *Ga.* 805 (30 *S. E.* 966); *Stix v. Pump*, 37 *Ga.* 332, and *Shropshire v. Johnson*, 62 *Ga.* 359, to the effect that a party who knows of certain irregularities in the trial of a case, but says nothing concerning them, and sits back and waits to see if a verdict is returned in his favor, cannot thereafter take advantage of such irregularities and object to the verdict against him, but he will be held to have waived the same by his silence and failure to object to the same at the proper time, have no application to the case at bar. Here the plaintiff complied with the statute by giving the court a timely request to give its charge to the jury in writing. After he had done this, nothing further remained for the plaintiff to do. There was nothing to put the plaintiff on notice that the court had not read the paper presented and noted the request therein embodied, which was the very first paragraph in the paper, to put his charge in writing and read the same to the jury.

Corpus Juris says: "A request for written instructions should be made in such a manner as to inform the court clearly of the desire of the party on the subject." 64 C. J. 646. The statute (code section 4847) in our State which controls this matter provides that the trial judge shall give his charge to the jury in writing, that is to say, shall write out his charge and read the same to the jury, in all civil cases, when counsel for either party shall require them to do so. It would seem that a paper entitled in the cause, containing specific requests to give in

charge certain principles of law, and which contains as the first paragraph thereof a request that the charge of the court be put in writing and read to the jury, and which is presented to the court two days before arguments to the jury were begun, was a sufficient compliance with the statute. The paper was then presented to the judge, who placed his initials thereon, as receiving the same before the arguments began. The contention of counsel for the defendant, that this paragraph was so located on the page as to be easily and naturally overlooked by the trial judge or anyone who would read the paper, does not seem plausible. It was not in an obscure place, but was the very first writing on the paper, the very first paragraph one would encounter when undertaking to read the paper presented.

Judgment reversed. Stephens, J., concurs. Jenkins, P. J., dissents.

Stephens, J., concurring specially. I concur, but do not commit myself to the proposition that the errors committed are not reversible errors.

Jenkins, P. J., dissenting. I do not fully agree with the rule of law stated in the 1st division of the syllabus and opinion. I concur in the conclusions, but not in all that is said, in the remaining divisions of the syllabus and opinion, except the 7th. I disagree with the conclusions reached in that paragraph. Irrespective of the various reasons assigned by the defendant in error as to why the failure of the judge to reduce the charge to writing would not, under the facts disclosed by the record in this case, amount to reversible error, it is my opinion that exception cannot be taken to such failure on the part of the judge under a direct bill of exceptions. While it is true that the rule of procedure under section 6-804 of the Code of 1933, authorizing a direct bill of exceptions from a ruling of the court which necessarily has been controlling in the trial of the case, does not

mean that the movant must show that but for the ruling he must necessarily have prevailed in the court below, this section must nevertheless be interpreted to mean that he must affirmatively show that the effect of the ruling was such as necessarily prevented him from prevailing in the case. In other words, he does not have to show that he would certainly have won the case but for the adverse ruling; but he must show that the effect of the ruling rendered it impossible for him to do so. In my opinion, the legislature by its act of 1898 embodied in this Code section, which permits direct exceptions to rulings where the "verdict necessarily has been controlled" thereby, did not intend to put direct bills of exceptions on the identical footing with ordinary bills of exceptions where a motion for new trial has been made. In ordinary bills of exceptions, unless a verdict was demanded by the evidence, any erroneous ruling or decision whereby the movant has been deprived of some substantial right requires a reversal of the judgment; whereas on a direct bill of exceptions he must not only show some material erroneous ruling or decision of the trial court, but must go further and affirmatively show that the effect of such ruling or decision must necessarily have been fatal to his case. I therefore do not agree with all that is said by my brethren in the first division of the syllabus and opinion, and differ with them as to the conclusion drawn in the seventh division. It might be conceded that the court committed what would ordinarily amount to reversible error in failing to reduce the charge to writing upon the request of counsel; yet under the procedure adopted by the plaintiff in error, unless he went further and affirmatively showed that such illegal and erroneous failure on the part of the trial judge was injurious to the movant's rights to the extent that it was necessarily fatal to his cause, it is my opinion that the exception to such failure, in a direct bill of exceptions, would not authorize a reversal of the judgment. In other words, in order for this court to hold that the action of the trial court

in not writing out its charge and reading it necessarily controlled the result, the plaintiff in error would be compelled to affirmatively show that the failure to do so necessarily precluded a verdict in his favor. This he has entirely failed to do. No effort is even made to show that the charge as actually given was in any wise erroneous, other than by showing that it was not first reduced to writing as requested.

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1. It is error for the trial judge to refuse a timely and proper request to write out his charge and read it to the jury; and such error may be complained of in a direct bill of exceptions, without a motion for a new trial, where it is shown that the verdict was not demanded.

2. Such a request may be subsequently waived, and in such case there would be no error in refusing it. Under the facts of this case, the failure of the judge to comply with such a request was not cause for a reversal. Accordingly, the decision of the Court of Appeals was erroneous so far as it reversed the judgment of the trial court.

No. 10796. March 28, 1936. Rehearing denied March 31, 1936. Certiorari; from Court of Appeals. 50 Ga. App. 866. William G. Grant, Marion Smith, Harold Hirsch, James A. Branch, James W. Austin, E. A. Stephens, J. Walter LeCraw, William Schley Howard, and R. Emerson Gardner, for plaintiff in error.

George G. Finch, contra.

PER CURIAM. William G. McRae brought suit against John A. Boykin for alleged libel. The defendant answered, and filed a counter-claim based upon alleged libelous statements of the plaintiff concerning him, which he alleged had damaged him. The trial before a jury resulted in a verdict for the defendant for $1000. The plaintiff did not file a motion for a new trial, but carried the case by bill of exceptions directly to the Court of Appeals, complaining that the court below had committed alleged errors which he contended were controlling. The Court of Appeals overruled a motion to dismiss the writ of error, and reversed the judgment of the trial court. *McRae v. Boykin*, 50 *Ga. App.* 866 (179 *S. E.* 535). The motion to

dismiss was based on the ground that a motion for new trial was necessary, thus raising an important practice question. On petition of Boykin, the defendant in error, certiorari was granted. Only such parts of the decision as overruled the motion to dismiss and as reversed the judgment are under review in this proceeding. One of the alleged errors was that the judge failed to write out his charge and read it to the jury, in accordance with a timely and proper request. The bill of exceptions, as sued out by the plaintiff, McRae, contained the statement that the verdict against him was not demanded by the evidence. It will be assumed that the request referred to was in proper form and was duly presented to the trial judge. It was embodied in a paper which contained, in addition, certain requests to charge, stated in numbered paragraphs. The particular request here under consideration was in the first paragraph, which was not numbered. This document reached the judge two days before counsel began their arguments. The failure of the judge to comply with the request was, by direction of the court, explained in the bill of exceptions, as follows:

"Upon examining the paper the judge saw that it was separate requests to charge. He thereupon studied the separate requests and made the notation of them shown on the paper. He did not read the first paragraph, presuming that the portion of the paper there set out was a mere statement of the case. The first time the judge actually knew that there was anything in the paper about a written charge was when his secretary stated to the judge that counsel for the plaintiff had stated that such a request had been made. This was after the jury had been charged and had retired, but before a verdict had been rendered. The judge sent for plaintiff's counsel and stated to him he was not aware of any such request being made. Plaintiff's counsel stated that it had been made. This paper . . . was then referred to and the judge's attention called to the first

paragraph. The judge thereupon said he had not seen this statement before. Plaintiff's counsel stated that it was not a trick, but was made bona fide. Plaintiff's counsel further stated that it would not amount to anything, as they were not going up on a motion for a new trial, but plaintiff's counsel added that plaintiff was not waiving anything. At the time this statement was made by plaintiff's counsel the judge, if he had construed the request as amounting to a request that he write out his charge and read it to the jury and file it with the clerk, could have brought the jury in, if he had not understood that the request would not be insisted upon, and could have withdrawn the charge as given verbally and as taken down by the official reporter, and have instructed the jury to disregard the same, and could have written out his charge and read it to the jury . . . Plaintiff's counsel did not himself hand the paper to the judge, and did not at any time before the charge was delivered call the judge's attention to there having been made to the court a request for a written charge, though counsel did ask the court if the court had received plaintiff's requests. After the conclusion of all the arguments and just before the charge was commenced and after the jury was reconvened for the sole purpose of hearing the charge, plaintiff's counsel arose and verbally and in writing . . . requested the court to instruct the jury relative to a certain section of the Florida law, which he read to the court in the presence of the jury. At this time plaintiff's counsel did not suggest the necessity for putting the charge so requested in writing, nor did plaintiff's counsel suggest that there had been any issue along this line. At the conclusion of the charge as given by the court, the question arose of permitting the jury to render a verdict in the absence of the court. The plaintiff's counsel expressed his willingness for a verdict to be received in the absence of the court. The defendant's counsel was unwilling for this to be done, unless the jury were furnished written forms which they could follow as models in

rendering whatever verdict they might determine to render. Thereupon certain forms covering the different possible verdicts in this case were prepared and agreed upon by counsel, and the court then had these written forms handed to the jury, and verbally instructed the jury as to the use of these forms. At the time this occurred, with the consent of counsel for both sides, no suggestion was made to the court by plaintiff's counsel that he had requested a written charge, or that anything was being done contrary to any request as to the manner of charging the jury; but, on the contrary, the plaintiff's counsel expressly agreed to what has just been stated."

The petition for certiorari contained, among others, an exception to the refusal of the Court of Appeals to dismiss the writ of error on the alleged ground that the failure of the trial judge to write out his charge and read it to the jury could be assigned as error only in a motion for a new trial, and that a direct bill of exceptions would not lie in such case.

1. It is error for the judge to refuse a timely and proper request to write out his charge and read it to the jury; and such error may be complained of in a direct bill of exceptions, without a motion for a new trial, where it appears that the verdict was not demanded. *Harris v. McArthur*, 90 *Ga.* 216 (4) (15 *S. E.* 758). That was a unanimous decision, rendered when the court was composed of three Justices. It was reviewed and limited in *Geer v. Dancer*, 148 *Ga.* 465 (4) (97 *S. E.* 406), but was not overruled so far as it applies to a case where the verdict was not demanded, but in such case it remains the law. To limit it further the concurrence of at least five Justices of the present bench is necessary (Code of 1933, P 6-1611), and not as many as five agree to do so. The decision is therefore controlling upon the practice question. See *Citizens Bank of Bainbridge v. Fort*, 142 *Ga.* 611 (83 *S. E.* 235). It follows that the Court of Appeals did not err in refusing to dismiss the writ of error.

2. But, under the facts of this case, was it cause for reversal that the judge failed to reduce his charge to writing and read it to the jury, as requested? This question must be answered in the negative. Under the recitals contained in the bill of exceptions, the request appears to have been waived. The facts, when stated according to their sequence, were as follows: (1) The request for a written charge was made two days before the arguments began. (2) "Just before the charge was commenced," the plaintiff's counsel "verbally and in writing . . . requested the court to instruct the jury relative to a certain section of the Florida law, which he read to the court in the presence of the jury. At this time plaintiff's counsel did not suggest the necessity for putting the charge so requested in writing." (3) "At the conclusion of the charge as given by the court, the question arose of permitting the jury to render a verdict in the absence of the court. The plaintiff's counsel expressed his willingness for a verdict to be received in the absence of the court. The defendant's counsel was unwilling for this to be done, unless the jury were furnished written forms which they could follow as models in rendering whatever verdict they might determine to render. Thereupon forms covering the different possible verdicts in this case were prepared and agreed upon by counsel, and the court then had these written forms handed to the jury, and verbally instructed the jury as to the use of these forms. At the time this occurred, with the consent of counsel for both sides, no suggestion was made to the court by plaintiff's counsel that he had requested a written charge, or that anything was being done contrary, to any request as to the manner of charging the jury, but, on the contrary, the plaintiff's counsel expressly agreed to what has just been stated." (4) After the jury "had been charged" and had retired, but before a verdict had been rendered, the judge's secretary informed him that counsel for the plaintiff had stated that "such a request had been made," that is, a request that the

charge be reduced to writing and read to the jury. "The judge sent for plaintiff's counsel and stated to him that he was not aware of any such request being made. The plaintiff's counsel stated that it had been made. This paper . . . was then referred to and the judge's attention called to the first paragraph. The judge thereupon said he had not seen this statement before. Plaintiff's counsel stated that it was not a trick, but was made bona fide. Plaintiff's counsel further stated that it would not amount to anything, as they were not going up on a motion for a new trial, but plaintiff's counsel added that plaintiff was not waiving anything. At the time this statement was made by plaintiff's counsel the judge, if he had construed the request as amounting to a request that he write out his charge and read it to the jury, and file it with the clerk, could have brought the jury in if he had not understood that the request would not be insisted upon, and could have withdrawn the charge as given verbally and as taken down by the official reporter, and could have instructed the jury to disregard the same, and could have written out his charge and read it to the jury."

The *oral* request for a charge on the Florida law evidently did not contemplate a written charge upon this subject, and the agreement of counsel that the judge might "verbally" instruct the jury as to the proper use of the written forms of verdict was utterly inconsistent with the previous request for an entire written charge. It is true that the judge had not as yet noticed the request for a written charge, as filed two days previously, but these facts were pertinent for his consideration when he did discover it and had to determine what he would then do with it. Upon the question of waiver, the judge's ignorance of the request at that time is immaterial. When the request for a written charge finally came to the attention of the judge, he sent for the plaintiff's attorney, who stated "that it would not amount to anything" in view of the future procedure con-

templated. The Attorney added that the plaintiff was not waiving anything; but if the request did not amount to anything, there was nothing to waive. To say that the request did not amount to anything was to describe it as being totally worthless. This was an expression of the attorney's own conception of its unimportance at that time, and stronger language could hardly have been employed. It could have had no other meaning except that, under the procedure which the plaintiff intended to adopt, the failure of the judge to comply with the request would be of no consequence, or would not afford any cause for complaint, even though the plaintiff did not waive compliance. It was in effect a statement that, in view of the anticipated procedure, the matter was not of sufficient importance to require a suspension of the trial at that stage for the purpose of complying with the request, because if the plaintiff did except, the exception would be without merit. The bill of exceptions recites in substance that the judge reached the conclusion "that the request would not be insisted upon;" otherwise he "could have withdrawn the charge as given verbally and as taken down by the official reporter, and could have instructed the jury to disregard the same, and could have written out his charge and read it to the jury." From all the circumstances, this conclusion was abundantly authorized, and the statement of counsel as to non-waiver did not require a different action by the trial judge. One may say he will not waive, and yet waive. *Cumming v. State*, 155 *Ga.* 346 (2), 349 (117 *S. E.* 378).

In two instances before the case was submitted to the jury under the charge of the court, the action of the plaintiff's attorney, as outlined above, indicated an abandonment of the request. Finally it was declared that the request did not amount to anything. While at the time of the last statement there was a reservation against waiver, there was no reservation on the previous occasions. From all the facts appearing, there can

be no reasonable inference other than that the request was waived; and in this view the question of estoppel need not be considered.

So much of the decision in *Wheatley v. West*, 61 *Ga.* 401 (4), as related to "express waiver" was obiter, there being *nothing* to show the basis of the judge's "impression." Furthermore, the decision in that case was rendered by a divided court, and will not be followed to the extent of holding that such a request once presented cannot be waived except in express terms. Except for the decision in that case, which the Court of Appeals doubtless felt constrained to follow, a different result might have been reached by that court.

On motion for rehearing, the opinion as originally filed in this case has been revised, with the result that the foregoing is now delivered as the decision of the court.

Judgment reversed. All the Justices concur, except Russell, Chief Justice, dissenting. I cannot for many reasons concur in the judgment of my learned colleagues. However, I shall content myself with stating only a few of these reasons at the present time. I cannot agree to the principle announced in the first headnote, in which it is said that "It is error for the trial judge to refuse a timely and proper request to write out his charge and read it to the jury; and such error may be complained of in a direct bill of exceptions, without a motion for a new trial, where it is shown that the verdict was not demanded." The Code of 1933, PP 81-1102, 81-1103, gives litigants in Georgia an unqualified right as follows: "The judges of the superior, city and county courts shall, when the counsel for either party requests it before argument begins, write out their charges and read them to the jury, and it shall be error to give any other or additional charge than that so written out and read." P 81-1102. "The charge so written

out and read shall be filed with the clerk of the court in which it was given, and shall be accessible to all persons interested in it; and the clerk shall give certified copies thereof to any person applying therefor, upon payment of the usual fee." P 81-1103. Recognizing the constitutional distinction between the legislative and the judicial departments of this State, I consider the qualification in the headnote limiting the right to cases "where it is shown that the verdict was not demanded," only, as judicial legislation. No such burden is imposed by the law as set forth in the Code. This court, however, as well pointed out by Judge Sutton in the opinion of the Court of Appeals, in the two earliest decisions it ever rendered, recognized the wisdom of such a rule. Judge Cobb, in *Cawthon v. State*, 119 *Ga.* 395 (46 *S. E.* 897), adverted to the earliest history of the principle now embodied in the sections quoted. The real purpose in view in the provisions of the law upon this subject was pointed out by *Judge Jackson in Fry v. Shehee*, 55 *Ga.* 214, in the following words: "The great object of the statute is to prevent disputes between the judge and counsel as to what was the charge; and the only way to prevent them is to require the courts to conform rigidly to the statute. Indeed, the better practice would be for the judge to put every charge in every cass of importance in writing. It may be a little troublesome and laborious, but it would avoid much wrangling and controversy, and sometimes a good deal of hard feeling, and would make the practice more pleasant both for bench and bar, and insure fairness in exceptions and assignments of error here." Judge Bleckley's graphic analysis of the subject, in *Wheatley v. West*, 61 *Ga.* 401, has been cited and approved in the decision of the Court of Appeals now under review. I can add nothing to what was so well said by Judge Sutton; and yet I must demur to the declaration in the opinion of the majority of this court that what was said by Judge Bleckley in the matter under consideration was mere obiter. The

word "obiter" means a thing apart from the matter under consideration—dehors the record. It is defined in Bouvier's Law Dictionary as "by the way; in passing. 'This point was not the principal question in the case, but the law concerning it is delivered obiter only, and in the course of the argument.' 2 Bl. Com. 238." And Funk & Wagnall's Standard Dictionary says: "By the way; incidentally; not in necessary connection with the issue to be determined." Webster's International Dictionary defines the word as "on the way . . . in passing; incidentally; by the way; . . . obiter dicta . . . an incidental and collateral opinion uttered by a judge, and therefore not material to his decision or judgment; not binding." The majority of the court is authorized by law, if it sees fit, to disregard Judge Bleckley's views, because one member of the court as then constituted disagreed with him. However, I cannot bring myself to agree that what Judge Bleckley said on this subject was not absolutely apropos to the subject he was dealing with. I know that my colleagues will not complain of my dissenting, for I was committed to the same view which I now entertain when I had the honor of delivering the unanimous opinion of the Court of Appeals in *Homer v. State*, 6 *Ga. App.* 667 (65 *S. E.* 701), and later when I concurred with the other members of that court in the masterly opinion written by Hill, C. J., in *Forrester v. Cocke*, 6 *Ga. App.* 829 (65 *S. E.* 1063). As to the case last cited, extreme pressure of the business of the court prevented my calling attention to the words "except where the evidence demands the verdict," and therefore from entering a special instead of a general concurrence. I agree with the majority of this court that the failure or refusal of a judge, for any reason, to write out his charge and read it to the jury, and then hand it immediately to the clerk, is an error which may be reviewed by a direct bill of exceptions and without any motion for a new trial; this for the reason that the error is fundamental and controlling. In the circumstances

set forth in the Code, it is an unlawful act for the judge to attempt to give anything but a complete charge in writing, which he cannot alter after having delivered it. To this end he is required to hand it to the clerk, as its only custodian; and the clerk is required, upon payment of his fee, to give *any person interested* a certified copy of the charge. The most that can be said against any charge of a court is that it was, in some respect specified, erroneous and contrary to law. Is it less subject to attack when the entire charge is directly contrary to law? To use the language of Judge Bleckley in *Wheatley v. West*, 61 *Ga.* 401, 409, "What objection to a charge is more fatal than that every syllable of it was delivered contrary to law?"

In the second headnote of the opinion of the majority the decision of the Court of Appeals is held to be erroneous, and the judgment is reversed because, "Under the facts of this case, the failure of the judge to comply with such a request was not cause for reversal." From this ruling I dissent in toto, being of the opinion that my colleagues have misapprehended the cardinal rules upon which the doctrine of waiver is based, and they assume, in construing the conduct of counsel for the plaintiff in the lower court (defendant in error here), *that he knew that the trial judge had not read his request* that the entire charge be delivered in writing, and that he knew that the charge actually given was not all in writing. There is nothing in the entire record showing either directly or by circumstances that Mr. Finch knew at the time the charge as given was delivered that it had not been reduced to writing according to his request, the receipt of which is admitted by the judge; or that he knew that the judge had not read his written request, preferred seemingly at a time sufficient to have given the judge time to prepare a written charge and read it to the jury. Waivers are either express or implied. The opinion of the majority of this court contains no expression that indicates that they claim that there

was an express waiver of the request for compliance with the Code, PP 81-1102, 81-1103, requiring that a charge in writing be read to the jury. The majority hold that the record presents circumstances from which a waiver may be implied. I am not aware of any principle by which the doctrine of waiver can be so extended that one can waive something he has no right to waive. The Code of 1933, P 81-1101, provides: "In the trial of causes in any of the courts of this State, either party or his counsel may make a written request to the court to charge the jury, at any time before the jury retires to consider of their verdict, and without submitting the same to the counsel of the opposite party. Requests in writing to charge the jury may be made in any case, and at any time before the charge is begun." Viewing the case most strictly, since the plaintiff had already requested a charge in writing, and as far as he knew the judge had considered it and of course was complying with it, the plaintiff had no right to make a request that the judge's written charge then in his hands should be changed, but there was no conflict between this and the prior request which would introduce a waiver into the question. The request for a charge in writing was made two days before the argument in the case began. The request that that written charge should be amended was made after the argument had been completed. Under the law, the plaintiff had no right to ask that the judge amend his charge, any more than the defendant had the right to be permitted to participate in the judge's decision as to whether he would put his charge in writing. The court was there to obey the law. It must be presumed that if the judge had not omitted to read the request, he would have complied with it by reducing his instructions to the jury to writing, reading them only to the jury, and immediately handing them to the clerk to see that they were not thereafter altered. Since it appears from the record that there was no conflict in the request with any possible instructions that could have been given in behalf of the plain-

tiff, and since Mr. Finch did not know that the judge was not going to give a complete charge in writing, read to the jury, there was in fact no right at the time existent in his client, the plaintiff, that could be waived; for one can not waive that which he never had, has not, and that it is not possible for him to possess or avail himself of. Certainly there could be no waiver on the part of Mr. Finch of the right he had under the original request for a charge in writing to be read to the jury and delivered to the clerk, from the refusal of the judge to give instructions as to the Florida law. If the request had already been complied with so far as the preparation of the charge about to be delivered by the judge was concerned, the refusal of the judge to embody in the written charge the principle sought to have stated to the jury would not in any sense of the word affect a waiver of the previous request of plaintiff's counsel. There was no conflict between this and the prior request, because, if the judge had desired to incorporate a ruling upon the subject of Florida law, the request was made before the argument began, and he could easily have reduced it to writing. If there were any hint in the record that plaintiff's counsel knew at this time that the judge had failed or refused, for any reason, to grant his request for a charge in writing, preferred two days before, then it may be that a different case would have been presented. As matter of law, it can hardly be contended that blame should be attributed to counsel for the plaintiff from the circumstance of the omission of the judge to read the request that the charge be delivered in writing. I agree fully with the conclusion of the Court of Appeals as to there being no waiver of the request for a charge solely and wholly in writing, growing out of what transpired in the conference with Mr. Finch, counsel for the plaintiff, after the jury had been charged by the court, which conference was invited by the court. From the fact that the trial was practically completed and that the jury had retired to the jury-room, and the lack of any statement in

the bill of exceptions that the judge was upon the bench at the time of his conversation with Mr. Finch, there can be no other inference than that the conference occurred in the private office, commonly called the "chambers" of the judge, during a temporary recess, awaiting the return of the jury. The conversation, therefore, must be treated as between individuals, and therefore to some extent confidential. But pretermitting any reference to proprieties, I can not see how there can be wiped out of consideration the last remark of counsel, as certified by the judge, that the "plaintiff was not waiving anything." It appears from the record that Mr. McRae, while enjoying the services of Mr. Finch, was also representing himself, as any one has the right to do; and the judge made no inquiry as to Mr. McRae's wishes in the matter, though he was the only plaintiff in the case, and his counsel, speaking for him, distinctly told the judge that the "plaintiff was not waiving anything."

The statements in the bill of exceptions which the judge certifies he required to be inserted are absolutely true, and are not to be disputed here or elsewhere. However, candor compels the statement that a large portion of the inset in the bill of exceptions is argumentative and not the statement of facts, but a recital of the deductions of the learned trial judge. In arguendo, the judge states that "if he had construed the request as amounting to a request that he write out his charge and read it to the jury, and file it with the clerk, (he) could have brought the jury in if he had not understood that the request would not be insisted upon, and *could have* withdrawn the charge as given verbally and as taken down by the official reporter, and *could have* written out his charge and read it to the jury." But he does not certify that he "would have" done any of these things, and furthermore he did not communicate to Mr. Finch even that he could have done any of these things, nor intimate to him that he would; and as the majority of the court differ with

the writer upon this point, I will only say that in the circumstances appearing in this portion of the bill of exceptions it is the opinion of the writer that after a judge has just learned for the first time that a request for a charge in writing in the terms of PP 81-1102 and 81-1103 of the Code was on a paper that the clerk of his court, at the request of the counsel of one of the parties in the case on trial, had handed him two days before, he should immediately return the jury to the court-room and expressly withdraw the charge already delivered by him. He should take a recess of sufficient length to have a charge in full, in accordance with the Code sections, reduced to writing, and read the same to the jury, and hand it at once to the clerk of the court for the purposes indicated in several decisions of this court as well as expressly required by the Code. No matter how tricky the parties were, no matter if Mr. Finch, as counsel for the plaintiff, did not think taking the case up would amount to anything, there stood the law of sections 81-1102 and 81-1103, and there stood the imperative warning of Mr. McRae's counsel that "plaintiff was not waiving anything." No words could be more exhaustive than the last, because if he waived nothing he would be asking for even the smallest imaginable thing that might appertain to his rights. There is not a scintilla of evidence indicating that at the time the agreement was made as to the forms of verdict this could constitute a waiver of a charge in writing. The charge of the court instructs the jury how to make a verdict. The verdict is merely the record of the result of the trial. The charge had been delivered, and was complete in every respect. If, as Mr. Finch had a right to believe, the request for a charge in writing had been complied with, then the mere form of a verdict was a mere matter of convenience, not affecting any right of the parties, and not in conflict with the provisions of the Code sections. It certainly constituted no waiver that the instructions to the jury, both as to the law and the evidence, should be reduced to writing.

As this is a mere dissent, and further consumption of time and space is fruitless, I deem it unnecessary to state other reasons which can be presented in opposition to the opinion of my esteemed colleagues. One reason why the provisions of sections 81-1102 and 81-1103 should not be minimized and whittled away was stated in a civil case by Broyles, P. J., where a new trial was granted because the judge retained his charge overnight. In *Ashley-Price Lumber Co. v. Henry*, 23 *Ga. App.* 94 (98 *S. E.* 185), Judge Broyles said: "In the instant case, instead of filing with the clerk of the court the typewritten charge as soon as it had been read to the jury, the judge retained it in his possession, and did not deliver it to the clerk until the following day. This was reversible error, and a new trial of the case is required."

On the assumption that this court has jurisdiction to revise, modify, and change its decision on questions determined therein and not necessarily reopened by the decision or mandate of the Supreme Court on certiorari, it is now ruled, on the record and the proceedings in this case, that the rulings heretofore made should not be changed or modified except in accordance with the decision and mandate of the Supreme Court. The plaintiff's motion to revise the opinion of this court in designated particulars, on the ground that certain adverse rulings were erroneous, is denied.

Decided July 16, 1936. Rehearing denied July 29, 1936.

Action of libel; from Atlanta city court—Judge Dorsey. December 21, 1933. (Certiorari denied by Supreme Court.)

George G. Finch, for plaintiff.

W. G. Grant, Marion Smith, J. A. Branch, J. W. Austin, E. A. Stephens, J. W. LeCraw, W. S. Howard, R. E. Gardner, for defendant.

Sutton, J. This case was brought to this court by direct bill of exceptions, in which there were certain assignments of error on the admission of evidence in behalf of the defendant, over objection of the plaintiff, on the rejection of certain testimony offered by the plaintiff and objected to by the defendant, and on the failure of the judge to write out his charge and read it to the jury, after a timely written request to do so had been given him by the plaintiff. The defendant in error made a motion to dismiss the bill of exceptions. This court rendered its decision at the October term 1934, overruling defendant in error's motion to dismiss the writ of error, and reversing the judgment because the judge failed to write out his charge and read it to the jury as requested by the plaintiff and also holding

that certain rulings of the court as to the admission of defendant's evidence over objection of plaintiff and as to the rejection of evidence of the plaintiff on objection of defendant were erroneous; but further holding, by a majority of the court concurring, that such admission and rejection of evidence were not reversible error as presented by the direct bill of exceptions. *McRae v. Boykin*, 50 *Ga. App.* 866 (179 *S. E.* 535). The defendant in error made application to the Supreme Court for certiorari, to review the rulings of this court that were adverse to him; and the plaintiff in error also made application to the Supreme Court for certiorari, to review the rulings of this court that were adverse to him. The plaintiff's petition for certiorari was denied, but that of the defendant was granted, and the case was placed on the calendar for argument and assignment. See 50 *Ga. App.* 902. The Supreme Court rendered its decision holding that a direct exception could be taken to the refusal of the judge to write out his charge, when duly requested, and that the Court of Appeals properly denied the defendant in error's motion to dismiss the plaintiff in error's bill of exceptions on the ground that the errors assigned were not such as could be reviewed by a bill of exceptions without a motion for new trial, but that the Court of Appeals erred in reversing the judgment because of the failure to write out the judge's charge and read it to the jury, in that the plaintiff's counsel, after requesting the court to do, waived the right to have the charge written out and read to the jury. *Boykin v. McRae*, 182 *Ga.* 252 (185 *S. E.* 246).

When a judgment by this court has been reversed by the Supreme Court on certiorari, the clerk of this court, upon receipt of the remittitur from the Supreme Court, shall bring the matter to the immediate attention of the division of this court which rendered the decision, "for such further order as may be proper in the case." Code, P 24-3648. Upon the issuance

of the remittitur in this case by the Supreme Court and its transmission to this court, counsel for the plaintiff in error filed in this court what he terms "his motion to revise the opinion" rendered by this court and appearing in 50 *Ga. App.*, supra, in certain designated particulars, on the ground that certain rulings of this court in the case adverse to him were erroneous. The jurisdiction of the Court of Appeals of a writ of error attaches when it is filed in the clerk's office of this court, and continues as long as the writ of error is in this court and until the remittitur of mandate of this court is sent to the trial court. Where there has been a decision and judgment in the case, the jurisdiction of this court of the case extends to the end of the term, unless the remittitur from this court shall contain the judgment of the court . . . and unless otherwise ordered, or unless a notice of intention to apply to the Supreme Court for the writ of certiorari or a motion for a rehearing has been previously filed, shall be transmitted to the clerk of the trial court as soon as practicable after the expiration of ten days from the date of the judgment." Code PP 24-3644, 24-3646. A case decided in the Court of Appeals remains pending therein until the adjournment of the term at which the decision was rendered, unless the remittitur has been transmitted to the trial court. Until then the judgment of the reviewing court is subject to be modified or entirely changed, on motion of either party for a rehearing, timely filed, or by the court ex mero motu. *In re Fite*, 11 *Ga. App.* 665 (76 *S. E.* 397). A motion for a rehearing must be filed in the office of the clerk of this court during the term at which the judgment sought to be reviewed was rendered, and before the remittitur in the case has been forwarded to the clerk of the trial court. Code, P 24-3643.

The Supreme Court and the Court of Appeals have no jurisdiction to entertain a motion for a rehearing at a term subsequent to that at which the decision in the case was rendered.

Cooper v. Portner Brewing Co., 113 *Ga.* 1 (38 *S. E.* 347); *Grant v. State*, 45 *Ga.* 477. A motion for rehearing filed after the adjournment of the term at which the decision was rendered cannot be considered. *Greene County v. Wright*, 127 *Ga.* 150 (56 *S. E.* 288). Aliter before the expiration of the term and before the remittitur has gone down. See *Seaboard Air-Line Ry. v. Jones*, 119 *Ga.* 907 (47 *S. E.* 320); *Wheatley v. Glover*, 125 *Ga.* 711, 733 (54 *S. E.* 626); *Byrd v. Clark*, 170 *Ga.* 912 (154 *S. E.* 881). Where within the time prescribed by law a petition for certiorari is filed, the mandate of this court shall be held up by the clerk of this court pending the disposition of the certiorari by the Supreme Court; and where the writ is granted, the remittitur is stayed until the disposition thereof by that court. Code PF 24-3644, 24-3646; *Georgia Power Co. v. Decatur*, 181 *Ga.* 187, 192 (182 *S. E.* 32); *Kingman v. Western Mfg. Co.*, 170 *U. S.* 675, 678, 680 (18 *Sup. Ct.* 786, 42 *L. ed.* 1192); *Omaha & Co. v. Omaha*, 216 *Fed.* 848 (2), 855; *Burget v. Robinson*, 123 *Fed.* 262. It seems that these decisions hold that the effect of staying the mandate is to toll the term so far as the jurisdiction of the intermediate court of the case is concerned; and that that court may in a proper case, after the term at which the decision was rendered has passed, modify, change, amend, and revise its decision, while the case is still pending in that court. Also see *Central of Ga. Ry. Co. v. Keating*, 47 *Ga. App.* 336 (170 *S. E.* 497); *Hall v. Slaton*, 38 *Ga. App.* 619 (144 *S. E.* 827); *Slaton v. Hall*, 168 *Ga.* 710 (148 *S. E.* 741, 73 *A. L. R.* 891), *s. c.* 172 *Ga.* 675 (158 *S. E.* 747); *Hall v. Slaton*, 40 *Ga. App.* 288 (149 *S. E.* 306). The proceeding in this court must, in such a case, be in conformity to the ruling of the Supreme Court in the case. However, it is to be remembered that in passing on a case that is up on certiorari the Supreme Court does not pass on all the questions in the case or on all the rulings made by this court, but only on those questions clearly presented by the petition for the writ of cer-

tiorari. Code, P 24-4549; *Mitchell v. Owen*, 159 *Ga.* 690, 701 (127 *S. E.* 122). The present case is not like *Kiser v. Doyal*, 51 *Ga. App.* 30 (179 *S. E.* 578), 182 *Ga.* 175 (184 *S. E.* 860). In that case the judgment of this court was affirmed by the Supreme Court on certiorari. "Where a judgment of this court is affirmed by the Supreme Court, or where the writ of certiorari is denied, the remittitur of this court shall issue immediately upon the filing of the remittitur from the Supreme Court. No entry upon the minutes shall be made." Code, P 24-3647. This court has no further jurisdiction in the case. When a judgment is reversed the situation is different. "Where a judgment of this court is reversed, or where instruction is given by the Supreme Court, the clerk, upon receipt of the remittitur, shall bring the matter to the immediate attention of the division which rendered the decision complained of, for such further order as may be proper in the case." Code, P 24-3648.

As above stated, the plaintiff in error applied to the Supreme Court for a certiorari to review that portion of the decision adverse to him and which he now asks this court to revise and change, but his certiorari was denied. Assuming, under the authorities above cited, that this court has jurisdiction and power to revise, modify, and change its decision on questions which it has determined, and which have not been necessarily reopened by virtue of the decision of the Supreme Court on certiorari or its mandate, still, under the record and proceedings had in this case in this court and the Supreme Court, we are of the opinion that the rulings heretofore made by this court should not be changed or modified, except in accordance with the decision and mandate of the Supreme Court on the certiorari. The plaintiff's motion is therefore denied. In accordance with the ruling of the Supreme Court in this case, the ruling of this court granting a new trial because of the failure of the judge to write out his charge and read the same to the jury is vacated, and the judgment of the trial court is affirmed.

Judgment affirmed. Jenkins, P. J., concurs. Stephens, J., dissents.

Stephens, J. I am of the opinion that the errors pointed out in paragraphs 2, 3, and 5 of the syllabus and the opinion, as appear in the report of this case in 50 *Ga. App.* 866 (179 *S. E.* 535), constituted error demanding the grant of a new trial. Being of this opinion, I dissent from the judgment of affirmance.